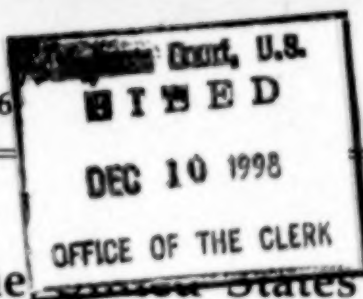


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No. 98-586



In The
Supreme Court of the United States
October Term, 1998

TOMMY DAVID STRICKLER,

Petitioner,

vs.

FRED W. GREENE, WARDEN,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

JOINT APPENDIX
VOLUME I, PAGES 1 TO 211

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**Petition For Certiorari Filed September 1, 1998
Certiorari Granted October 5, 1998**

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**STRICKLER V. GREENE, WARDEN
NO. 98-5864**

RELEVANT DOCKET EVENTS

February 27, 1990	Indictment for Robbery Indictment for Abduction
April 23, 1990	Indictment for Capital Murder
June 18-21, 1990	Capital trial. Petitioner sentenced to death.
April 19, 1991	Convictions and death sentence affirmed by the Supreme Court of Virginia, Strickler v. Commonwealth.
December 5, 1991	Order appointing state habeas counsel.
August 27, 1992	Petition for writ of habeas corpus filed in the Circuit Court for the County of Augusta, Virginia.
September 10, 1993	Petition for writ of habeas corpus denied by order of the Circuit Court of the County of Augusta, Virginia.
December 8, 1993	Petition for Appeal from denial of state habeas petition filed in the Supreme Court of Virginia.
January 13, 1995	Opinion of the Supreme Court of Virginia affirming the denial of the writ of habeas corpus. Strickler v. Murray.
March 5, 1996	Petition for writ of habeas corpus filed in the U.S. District Court (E.D. Va.)

May 20, 1996 Amended petition for writ of habeas corpus filed in the U.S. District Court (E.D. Va.)

October 15, 1997 Final order and opinion granting petition for writ of habeas corpus.

June 17, 1998 Opinion of the United States Court of Appeals for the fourth Circuit reversing the grant of the writ by the district court. Strickler v. Pruett.

October 5, 1998 Order granting petition for writ of certiorari

State of Virginia, County of Augusta: February 27, 1990
IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January ____, in the year One Thousand Nine Hundred Ninety ____, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully and feloniously rob Leanne Whitlock of a motor vehicle and other personal property by violence to the person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm in violation of Virginia Code Section 18.2-58.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-58 (Penalty defined therein)

This indictment is found on the testimony of

Sgt. W. C. Campbell
Capt. Duane Fairweather

Witness sworn in Court and sent before the Grand Jury to testify

February 27, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Robbery

Violation Va. Code § 18.2-58

A True Bill

/s/ Vincent J. Schindler
Foreman

State of Virginia, County of Augusta: February 27, 1990
IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January _____, in the year One Thousand Nine Hundred Ninety _____, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or with the intent to defile Leanne Whitlock in violation of Virginia Code Section 18.2-58.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-48 (Class 2 Felony)

This indictment is found on the testimony of

Sgt. W. C. Campbell
Capt. Duane Fairweather

Witness sworn in Court and sent before the Grand Jury to testify

February 27, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Abduction with intent to extort pecuniary benefit
or with intent to defile

Violation Va. Code § 18.2-48

A True Bill

/s/ Vincent J. Schindler
Foreman

State of Virginia, County of Augusta: April 23, 1990
IN THE CIRCUIT COURT OF THE SAID COUNTY:

The Jurors of the Commonwealth of Virginia in and for the body of the County of Augusta and now attending the said Court, UPON THEIR OATH PRESENT, that on or about the 5th day of January ____, in the year One Thousand Nine Hundred Ninety ____, in the said County of Augusta,

THOMAS DAVID STRICKLER did unlawfully, feloniously, willfully, deliberately and with premeditation kill and murder Leanne Whitlock during the commission of robbery, rape or abduction with the intent to extort money or a pecuniary benefit.

against the peace and dignity of the Commonwealth of Virginia.

Violation of Virginia Code § : 18.2-31 (Class I Felony)

This indictment is found on the testimony of

Sgt. W. C. Campbell

Witness sworn in Court and sent before the Grand Jury to testify

April 23, 1990

/s/ Illegible,
Clerk

COMMONWEALTH
VS.
THOMAS DAVID STRICKLER

Indictment For

Capital Murder

Violation Va. Code § 18.2-31

A True Bill

/s/ Wm. F. Stansberry
Foreman

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

COMMONWEALTH OF VIRGINIA

V.

THOMAS DAVID STRICKLER

The following is a transcript of the evidence presented at the Trial of the above styled case as transcribed from the dictaphone tapes taken from the machine operated by Ruth B. Riggs, heard before the Honorable Thomas H. Wood, Judge of said Court, on the eighteenth day of June, 1990. Motions, objections and exceptions are included as they occur during the progress of trial.

Present: A. Lee Ervin
Attorney for the
Commonwealth

Richard E. Moore
Attorney for the Commonwealth

William E. Bobbitt, Jr.
Attorney for the Defendant

Thomas E. Roberts
Attorney for the Defendant

Thomas David Strickler
Defendant

* * *

[38] JUDGE: Mr. Ervin are you ready to proceed in the case of the Commonwealth of Virginia against Thomas David Strickler?

MR. ERVIN: Yes Your Honor.

JUDGE: Mr. Bobbitt are you ready to proceed?

MR. BOBBITT: Yes sir we are.

JUDGE: Mr. Bobbitt do you have all witnesses available that you want to have available?

MR. BOBBITT: We believe so Your Honor. Some are summonsed [sic] to be here on a later date but we . . .

JUDGE: Are you ready to proceed at this point?

MR. BOBBITT: We are ready to proceed at this time.

JUDGE: All right Mr. Strickler would you confer with your attorney concerning your plea to the charges and then step over to the Clerk's desk to be arraigned?

CLERK: The jurors for the Commonwealth of Virginia in and for the body of the County of Augusta, are now attending in the said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine [39] hundred and ninety, in the said County of Augusta, Thomas David Strickler did unlawfully and feloniously abduct Leanne Whitlock with the intent to extort money or other pecuniary benefit or with the intent to defile Leanne Whitlock in violation of Virginia Code Section 18.2-48. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your Honor. The jurors of the Commonwealth of Virginia in and for the body of the County of Augusta are now attending in the

said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine hundred and ninety in the County of Augusta, Thomas David Strickler did unlawfully and feloniously rob Leanne Whitlock of a motor vehicle and other personal property by violence of the person or by assault by putting the said Leanne Whitlock in fear of serious bodily harm in violation of Virginia Code Section 18.2-58. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your [40] Honor. The jurors of the Commonwealth of Virginia in and for the body of the County of Augusta are now attending in the said Court and upon their oath present. On or about the fifth day of January, in the year one thousand nine hundred and ninety, in the said County of Augusta, Thomas David Strickler did unlawfully and feloniously and willfully and deliberately and with premeditation kill and murder Leanne Whitlock during the commission of a robbery, rape or abduction with the intent to extort money or pecuniary benefit against the peace and dignity of the Commonwealth of Virginia in violation of Virginia Code Section 18.2-31. What say you to the charge in this indictment, are you guilty or not guilty?

MR. STRICKLER: Not guilty.

CLERK: The plea is not guilty Your Honor. Please raise your right hand. You shall answer truthfully and honestly the questions propounded to you by the Court. Mr. Strickler we are about to call a jury forward to decide this case. If you wish to challenge (inaudible).

* * *

[41] JUDGE: Ladies and gentlemen you have all been called here today to serve as jurors in [42] the case of the Commonwealth of Virginia against Thomas David Strickler. This is a criminal case. The defendant stands indicted for the offenses of abduction with the intent to defile or to extort money or other pecuniary benefit, capital murder and robbery. The indictment in this case alleges that all of these offenses were committed in Augusta County by the defendant on or about January 5, 1990. The defendant has entered a plea of not guilty to these charges and a jury has been called to hear the case.

* * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

[443] JUDGE: Thank you Mr. Roberts. Mr. Ervin you want to call your first witness?

MR. ERVIN: Call Ms. Whitlock.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ms. Whitlock would you state your full name please?

A. Esther Whitlock.

* * *

[445] Q. When was the last time you saw Leanne?

A. I saw Leanne on the Saturday before she died.

Q. Ms. Whitlock let me show you this photograph and ask you if you recognize that?

A. That is Leanne.

Q. That was Leanne?

A. That's my daughter.

MR. ERVIN: Judge I would offer this as Exhibit Number One.

JUDGE: Commonwealth's Exhibit One.

MR. BOBBITT: No objection Your Honor.

JUDGE: The photograph will be marked Commonwealth's Exhibit One and will be admitted into evidence.

MR. ERVIN: Ms. Whitlock I know it is difficult for you today. Sometime after January 13th, did you go to the Medical Examiner's Office?

A. Yes I did.

Q. And did he show you a body of a young woman there?

A. He did.

Q. And whose body was that?

A. The body was that of Leanne.

Q. Leanne. Ms. Whitlock let me show [446] you, ask you if you recognize these earrings?

A. These earrings belong to me.

Q. Where did you get them from?

A. I have had these earrings for years and years. More than likely I either bought them or I might have borrowed them from my mother or mother-in-law and kept them and never returned them.

Q. Who was the last person that you saw have these earrings?

A. Leanne.

Q. Are you sure these are the earrings?

A. They are my earrings.

MR. ERVIN: Judge we would offer these for identification purposes as Exhibit Number Two.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objection Your Honor.

JUDGE: These earrings will be marked Commonwealth's Exhibit Two for purposes of identification.

MR. ERVIN: So Ms. Whitlock let me show you a watch and ask you if you recognize it?

A. This watch is Leanne's (inaudible).

MR. ERVIN: I'm sorry I couldn't hear you.

A. It belongs to Leanne.

[447] Q. It belonged to Leanne?

A. Yes.

MR. ERVIN: Judge I would ask that this be marked Number Three for identification.

JUDGE: Any objection?

MR. BOBBITT: No objection.

JUDGE: The watch will be marked Commonwealth's Exhibit Three for purposes of identification.

MR. ERVIN: Ms. Whitlock this is Mr. Bobbitt, he may have some questions for you today.

MR. BOBBITT: No questions.

JUDGE: All right Ms. Whitlock.

MR. ERVIN: Your Honor may this witness be excused?

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

MR. ERVIN: Thank you.

JUDGE: You are excused Ms. Whitlock.

MR. ERVIN: Call John Dean, John Dean.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. John would you state your full name please?

[448] A. John Thomas Dean.

Q. And where do you live?

A. I live in Harrisonburg.

Q. Are you employed?

A. Yes sir.

Q. And where do you work?

A. I work for the Foot Locker at the Mall.

Q. And how long have you worked out there?

A. Since August of 1989.

Q. Did you know Leanne Whitlock?

A. Yes I did.

Q. And how long had you known Ms. Whitlock?

A. Since about the same time.

Q. What was your relationship with Ms. Whitlock?

A. Well she was my girlfriend. We had been dating since September.

Q. John I will direct your attention to the January 5th of 1990, did you see Ms. Whitlock that day, that evening?

A. Yes sir I did.

Q. Approximately what time did you see her?

[449] A. I last saw her approximately around four-thirty that evening.

Q. Where did you see her at?

A. In the Mall.

Q. And how did you happen to see her?

A. Well she had came early that day and was just hanging around, waiting on one of her friends and they were going to go out, she was going to get her paycheck from where she worked at and so she wanted to use my car so I let her use my car.

Q. What type of car did you have?

A. A 1986 Mercury Lynx.

Q. O.K. And how long had you had the car?

A. Since about three years.

Q. Did you let Leanne have your car to use?

A. Periodically.

Q. How about that day? Did you let her have it?

A. I let her use it, she was going to . . .

Q. When was she suppose to bring the car back to you?

A. Well after she got through with her [450] errands which would probably be like within an hour or two, something like that.

Q. And did she come back with your car?

A. No sir she didn't.

Q. When was the next time that you saw your car?

A. The next time I saw my car was actually about Tuesday, the next time I saw my car in person was about a month after it happened or something like that.

Q. Did you ever see Ms. Whitlock alive again after she took the car?

A. No I didn't.

Q. John let me show you these two photographs and ask you if you can identify these?

A. Yes sir.

Q. Are those accurate photographs of your vehicle?

A. Yes they are.

MR. ERVIN: Judge we would offer these as Exhibits Number Four and Number Five.

JUDGE: Any objections?

MR. BOBBITT: No sir.

JUDGE: All right. Gentlemen these two photographs will be marked Commonwealth's Exhibit Four

and Five, both will be admitted into [451] evidence. All right.

MR. ERVIN: Judge may I see the photographs again please? John these photographs show a lot of mud and dirt around the bottom of your car. When you loaned your car to Leanne Whitlock was that mud and dirt around your car like that?

A. No it wasn't.

Q. Was your car very clean?

A. No audible answer.

MR. ERVIN: Judge may these be passed around to the jury so they can be seen?

JUDGE: Yes sir.

MR. ERVIN: John you said you worked for Foot Lockers, is that correct?

A. Yes it is.

Q. And where is that located?

A. In the Valley Mall.

Q. Is that the Mall in Harrisonburg?

A. Yes it is.

Q. And you indicated that Ms. Whitlock had been out there for part of the day (inaudible)? When did Ms. Whitlock get there, do you remember approximately?

A. It was around four.

Q. And approximately what time did you [452] last see her when she left?

A. Four-thirty.

Q. Four-thirty. John this is Mr. Bobbitt, he may have some questions.

MR. BOBBITT: Mr. Roberts has some questions.

CROSS EXAMINATION

BY MR. ROBERTS:

Q. Mr. Dean let me just ask you two things. One is I missed when you began working at the Foot Locker?

A. When I began working at the Foot Locker?

Q. How long did you work at the Foot Locker?

A. I have worked at the Foot Locker here since August of '89.

Q. August of '89. O.K. I know this has been a very unpleasant ordeal for you but one question I must ask you. Did you have sexual intercourse with Leanne the night before she disappeared?

A. Yes I did.

MR. ROBERTS: That's all Judge.

* * *

[454] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Sonja would you state your full name please?

A. Sonja Lamb.

Q. You O.K.?

A. Yes.

Q. And what city do you live in?

A. Richmond, Virginia.

Q. Back in January of 1990, where were you living?

A. I was staying with Leanne Whitlock in an apartment at Madison Gardens.

Q. And how close is that to JMU?

A. It is about a five minute walk.

Q. Are you a student at JMU?

A. Yes.

Q. And how long have you been there?

A. Two years.

Q. Ms. Lamb I take you back to January 5th of 1990, do you remember that day?

A. Yes.

Q. Did you and Leanne do things together that day?

A. I went to work and Leanne stopped by [455] to see me. I got off at three-thirty and we were going to the movies afterwards. I met her at Foot Locker where she was and we went to the movie theater but the movie we were going to see had already started so we decided to go to the seven o'clock movie. Then we went to John and got his car keys and we left the Mall and went to K-Mart to pick up Leanne's paycheck. From there we went to

Grand's Furniture Store and we looked around the furniture store for a while and then we went back to our apartment.

Q. About what time did you get back to the apartment?

A. I would say about five o'clock.

Q. And did you all stay there the rest of the evening?

A. No. When I got back to the apartment (inaudible) Leanne went upstairs and she talked to her mother on the phone. She came back downstairs and we talked for a while and she went to Burger King with Beth (inaudible). I guess that was about maybe six o'clock, six ten. Then we came back and then Beth and Leanne came back and she ate and about six-thirty, maybe quarter 'till seven she left to give John back his car.

Q. O.K., who left to give John back his [456] car?

A. Leanne left the apartment to give John back his car and when she left she said after I pick up John, she was coming back to the apartment to get me because we were going back over to John's to look at a movie for that evening.

Q. Do you remember what Leanne was wearing when she left? If you don't that is O.K.

A. Black and green plaid pants, black shoes, she had on a pair of pearl earrings, I believe it was a creme top. And she had a black pocketbook and a jean jacket.

Q. O.K. Say she had on a pair of pearl earrings Sonja?

A. Yes sir.

Q. Let me show you Exhibit Number Two and ask you if you recognize those?

A. Yes.

Q. And whose are those?

A. These belong to Leanne.

Q. Are these the earrings that she was wearing when she left the apartment?

A. Yes sir.

MR. ERVIN: Judge at this time I would ask that Exhibit Number Two be introduced into [457] evidence.

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: Exhibit number, Commonwealth's Exhibit Two which was an exhibit which has previously been marked Commonwealth's Exhibit Two, will be admitted into evidence.

MR. ERVIN: After Leanne left the apartment, did you ever see her alive again?

A. No.

Q. When she first borrowed John's car, were you with her then?

A. Yes.

Q. And did you ride in the car?

A. Yes.

Q. Let me show you Exhibits Number Four and Five and ask you if you recognize that car?

A. This is John's car.

Q. O.K., now these pictures show quite a bit of mud and dirt on the bottom of the car, did it have all that mud and dirt on it when you all got it?

A. No.

* * *

[459] MR. ERVIN: Call Beth Rogers.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Beth would you state your full name please?

A. Bethany Rogers.

Q. Are you a little bit scared? How old are you Beth?

A. Twenty-one.

Q. Do you work any place?

A. Yes I do.

* * *

[461] Q. And now Beth I want to go back to January 5th of 1990, what did you do that day?

A. I hadn't done a lot. I was laid off work. I don't remember all of what I did that day.

Q. O.K. Later on that evening, did you do anything with Leanne?

A. Yes, she had to go get gas in her boyfriend's car and I had to go with her and keep her company and after we went to get gas, we decided to go to Burger King and get something to eat.

Q. And did Leanne get something to eat?

A. Yes she did.

Q. What did she get to eat?

A. I believe it was a cheeseburger and french fries.

Q. Cheeseburger and french fries. Did you all eat there at the place or what?

A. No we took it back to our apartment and ate there.

[462] Q. O.K. And about what time did you all eat?

A. Probably about six-thirty.

Q. Did you all stay there the rest of the evening?

A. No she left about quarter 'till seven or ten minutes 'till seven to go pick up her boyfriend at the Mall.

Q. Did you go with her?

A. No I stayed at the apartment.

Q. Did anybody go with her?

A. No she was alone.

Q. Do you remember what all she was wearing when she left?

A. She was wearing a creme colored sweater, some dark pants and a dungaree jacket.

Q. Say you all went over to Burger King (inaudible)?

A. Yes.

Q. What vehicle did you go in?

A. I don't remember the make and model of the car. It was a light blue. The car belonged to her boyfriend.

Q. Let me show you Exhibits Four and Five and ask you if you recognize these?

A. Yes, that was his car.

* * *

[464] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ms. Warner would you state your full name please?

A. Donna Lynn Warner.

Q. And do you live around here?

A. I live in (Inaudible).

Q. West Virginia?

A. Yes.

Q. Ms. Warner do you know Ronald Henderson?

[465] A. Yes I do.

Q. How long have you known Mr. Henderson?

A. Since Kindergarten.

Q. Direct your attention back to January the 5th of 1990. Do you remember that day?

A. Yes.

Q. O.K. And did you and your parents come over to Virginia?

A. Yes.

Q. For what purpose?

A. We came over to do some shopping.

Q. And where did you all go shopping at?

A. We were at the Mall.

Q. Valley Mall?

A. Yes.

Q. O.K. While you were there did you see Mr. Henderson?

A. Yes I did.

Q. Was anybody with Mr. Henderson?

A. Yes.

Q. And did that person introduce himself to you?

A. Ronald was the one that had [466] introduced us.

Q. About what time was this that you ran into Mr. Henderson and his friend?

A. A little before three o'clock.

Q. And how long did you talk with him?

A. Until four or a little after four.

Q. The friend that was with Mr. Henderson, is he in the Courtroom today?

A. Yes he is.

Q. And where is he seated?

A. Right there.

Q. In the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask that the record show that she identified the defendant.

JUDGE: So ordered. —

MR. ERVIN: O.K. This is Mr. Roberts and Mr. Bobbitt. They may have some questions for you.

MR. BOBBITT: No questions.

JUDGE: Thank you Ms. Warner.

MR. ERVIN: Thank you Ms. Warner, appreciate it.

JUDGE: Is she free to go?

MR. ERVIN: Yes sir.

JUDGE: Ms. Warner you are free to go.

[467] MR. ERVIN: Thank you. Call Virginia Smith.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Virginia Furr Smith.

Q. And your occupation?

A. I'm head of security at Valley Mall.

Q. How long have you had that position?

A. Four years.

Q. O.K. Direct your attention back to January 5th, 1990, were you working that evening?

A. I was.

Q. And who all was working with you, do you remember?

A. Up until six o'clock I was by myself, after that there was a Eddie (Inaudible), Joe Henkle and I believe Andrew Wright.

Q. During that afternoon, did anything unusual or suspicious happen for you?

A. Yes at approximately three-thirty to four o'clock, I received a report about two males that was trying to steal a white Continental on [468] the DMV side of the parking lot.

Q. What did you do in response to this?

A. I proceed to DMV parking lot and I hunted for the suspects and I could not find them.

Q. So what did you do after that?

A. I checked all the rest of the Mall, the parking lot. Then I went back inside and did locate the two people that was described to me.

Q. And after you located them, what did you do?

A. I spent time watching them.

Q. About what time did you first see them?

A. The first time I saw these two and I observed them earlier between one-thirty to two-thirty, somewhere along in there.

Q. And you say you started watching them that afternoon? About what time did you start watching them?

A. Really not until about three-thirty or four o'clock after I made the check on the parking lot and came back in. So it was probably quarter 'till five, five o'clock when I actually got down to watching them serious.

Q. Where were they located in the Mall?

A. They was at the Golden Chain Gang [469] when I came back in and found them which is a little jewelry place there in the middle of the Mall.

Q. How close is that to the Foot Locker Store?

A. It is about half-way between the Mall.

Q. What did you do after you located the two men?

A. I backed into (Inaudible) Shoes and talked to the manager and employees there and watched them go from the Chain Gang to Music Land. I watched them there for about fifteen or twenty minutes. They were just looking around. From there I went back to the Security office and met the crew that was coming on.

Q. And why did you do that?

A. I always meet the crew, we go over things that happened through the day. I wanted to point the two fellows out to them as we were making the rounds.

Q. Did you point these two fellows out?

A. No I did not.

Q. Why was that?

A. Because when I went (inaudible), we had one guard starting that night and I was making [470] rounds with him, couldn't find them. We went completely through the Mall, checked all the parking lots, came back in the Food Court and I went in to check the ladies restroom and came back out and did spot them at that time in the Food Court.

Q. About what time was this?

A. Some place I would say, quarter 'till seven, maybe even seven.

Q. How long were you able to keep them under observation?

A. Very shortly.

Q. What happened?

A. I think they knew that I was watching them also and they taken off out of the Food Court while I went to get the one guard. I wanted to show them to him and headed up the Mall and I lost them.

Q. You say this was about fifteen 'till seven the last time you saw them?

A. Somewhere along there.

Q. Virginia did you get a good look at them?

A. Yes I did.

Q. Is either one of these two men in the Courtroom today?

[471] A. Yes.

Q. And where is that person seated?

A. Sitting right there between the two gentlemen.

MR. ERVIN: Judge I would ask that the record show that the witness identified the defendant.

JUDGE: So ordered.

Q. Do you remember what this man was wearing that night Virginia?

A. Yes he had jeans, a jean jacket on, the jacket had a tear in the left (inaudible) seam four to five inches long.

Q. O.K.

A. Some kind of emblems on the back.

Q. How about, could you see his shirt.

A. No I did not notice his shirt.

Q. How about the shoes?

A. No I did not pay attention to his shoes. His dirty blonde hair, his wild eyes, he had a beard.

Q. He had a beard at that time?

A. He did, like he hadn't shaved for four or five days.

MR. ERVIN: O.K. Virginia this is Mr. Bobbitt. He may have some questions for you.

[472] CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Smith I notice that you have got a notebook in your hand with some notes in it, are those notes that you have taken about incidents you have just talked about?

A. I always take notes on any kind, anything unusual that is reported to me, yes.

Q. When did you make those notes?

A. I made these notes late that night.

Q. You talking about January 5th?

A. Yes.

Q. And where do you keep the notes?

A. I usually keep them in my file cabinet or in my desk drawer at the Mall.

Q. Do you have any independent recollection of what you just talked about or is it all from your notes?

A. No most of it I know in my head. Some of it, the times, you know, sometimes it can get pretty hectic at the Mall.

Q. I'm just trying to determine how much you are reciting from notes and how much you actually remember. During the time that you were watching the two men, did you see anybody else [473] with them?

A. No I did not.

Q. Did you ever see a girl with them?

A. No I did not.

Q. And you watched them from a period of about, you said, one or two o'clock and then seriously stared watching them around four or five o'clock up until . . .

A. Somewhere along there, in passing, I was making rounds through the Mall. I had stopped watching for fifteen, maybe twenty minutes or more and make a round.

Q. And then quarter 'till seven was the last time . . .

A. The last time I saw them was in the Food Court.

Q. The Food Court?

A. Yes they was headed out and around up toward the north end of the Mall.

MR. BOBBITT: I don't have any other questions.

MR. ERVIN: Judge may I have one moment?

[474] REDIRECT EXAMINATION

BY MR. ERVIN:

Q. Virginia let me show you this large photograph and ask you if you recognize that?

A. Yes it is an aerial photo of the Mall and surrounding areas.

MR. ERVIN: Judge I would offer this as Exhibit Number Six.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

JUDGE: This photograph of Valley Mall will be marked as Commonwealth Exhibit Six and will be admitted into evidence.

MR. ERVIN: Virginia you say that the two men were inside headed to the northern area of the Mall. Which way were they headed?

A. O.K. This would be the main entrance here so it would be, they came out of the Food Court and turned up the Mall.

Q. So they were going up this way the last time that you saw them?

A. Yes up toward J.C. Penney. If they had made a right they would have come to the main entrance and if they made a left they would have went to Watson's.

* * *

[476] MR. ERVIN: Call Anne Stolfus.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Ann would you state your full name?

A. I'm Anne (Inaudible) Stolfus.

Q. And Anne you were sworn in at the beginning?

A. Yes I was.

Q. Anne I want to take you back to January 5th of 1990, (inaudible), do you remember where you were?

A. Yes I do.

Q. Where did you go first?

A. Where do you want me to start? I started at JMU (inaudible), picked up my daughter and we headed out to the Mall.

Q. O.K., how old is your daughter?

A. My daughter is fourteen years old.

Q. And what were you going to the Mall for?

A. We first went to K-Mart to get a [477] prescription filled and I paid for that at 5:35, and headed over to the Mall and we were looking for a CD Disc for my daughter. We were having Christmas late for my oldest daughter who is a college student. And we went down to Music Land about six o'clock.

Q. What happened then?

A. Well I was waiting for a tall black gentlemen who is a clerk in the store. I think his name was Rob, I'm not sure. And he was, I was told he was the expert so I waiting to be waited on and a blonde girl and a man that I call "Mountain Man" came in, he was very impatient and I just sort of instinctively backed up because I was frightened and backed into a tall dark haired fellow that I call "Shy Guy" because he seemed a bit shy. And I apologized, of course, and then told Rob to go ahead and wait on "Mountain Man" because he seemed very impatient and revved up. And . . .

Q. What happened after that? Did you have any conversation with any of these people?

A. At that point, no I didn't have any conversation at that point. I do remember when I backed up into "Shy Guy" I bumped against his coat, he had a tan coat, draped over, a long coat [478] draped over his arm and I remember feeling, I thought I felt something hard in the coat and he seemed kind of defensive and quickly put it on.

Q. How about "Mountain Man", how was he dressed? Do you remember?

A. I remember how they were dressed. O.K., "Mountain Man" had a kind of multi layer look. He had a grey T-shirt and it had Harley Davidson across the front and, O.K., you must understand, my memory is a little vague. I remember some kind of open flannel shirt, maybe a grey greenish plaid and then over that was a denim jacket that had writing on the back in red and very brightly colored embroidery, I'm not sure if it was a colorful bird or maybe two flags that were crossed like that. And I am not sure about his shoes. He may have some kind of cowboy boots on. The girl had denim jeans on and a white top that had buttons down the front and white sneakers and the "Shy Guy" I am more vague about how he was dressed. Although his appearance was neater. He had either a white or a light colored shirt, probably a short sleeve knit shirt and his pants were neat. They weren't just old blue jeans. They may have been new blue jeans or it may have just been more dressy slacks of some sort, I'm not [479] sure.

Q. O.K. (Inaudible). The two men, did you get a good look at both of them at that time?

A. Oh yes, I certainly did.

Q. The pants that they were wearing, were they clean or did they have mud and dirt all over them, could you tell?

A. "Mountain Man" looked a little bedraggled but no they weren't dirty.

Q. Not at all?

A. No.

Q. About what time was this that you first ran into them?

A. That was six o'clock.

Q. And did you have any conversation with any of them?

A. Not at that point.

Q. O.K., what happened then?

A. O. K., What happened then was that Rob left the store and I was told that he took his supper break and I was to come back in a half an hour. I came back at six forty-five and it turned out that (inaudible) and that was a mistake. But as I am heading back down the central part of the Mall toward Music Land again which is a store on the right, first toward me came "Shy Guy" walking [480] by himself and then the blonde girl came next and then "Mountain Man" and he was calling her and keep yelling, my memory was Donna, Donna, Donna and I turned to

her and said are you Donna? And she said well Donna or Sharon, is my memory of what she said. And I said well he wants you and so she turned around to talk to him. And I stopped in my tracks because he was so revved up that I was concerned. I was, it just caught my attention and I had a concern. And so I just watched them momentarily and he said, you know, first he said where is Ronnie and she said up there. And then he said I've got to get out of here and she said you and Ronnie go and meet me at the bus stop and she turned, she turned and started walking up toward the bus stop again and then turned around, he was calling her again. Anyway she smacked right into me. Her button caught in my open weave sweater which is why I remember her attire. And so I got a very close look at her face and she asked me then where the bus stop was and I told her, which was just out of the front entrance to the Mall.

Q. Now Anne you said this "Mountain Man" was wearing a grey shirt with the insignia of Harley Davidson on it?

[481] A. That's my memory, yes.

Q. Let me ask you if you recognize this shirt?

A. That could have been it. Like I say it was under two other layers so I just saw the front.

Q. But this "Mountain Man" was wearing a shirt like this?

A. Right.

Q. Black over grey with a Harley Davidson on it?

A. Grayish, right.

Q. Do you see any difference between this one and the shirt that he was wearing that day?

A. It has been a long time.

MR. ERVIN: Judge I would offer this into evidence as Exhibit Number Seven.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objections.

JUDGE: The Commonwealth, the T-shirt will, the shirt will be marked Commonwealth Exhibit Seven and will be admitted into evidence.

MR. ERVIN: So after the . . .

MR. BOBBITT: Mr. Ervin, I'm sorry . . .

MR. ERVIN: I'm sorry Judge. After [482] these two people left, three people left, what did you do?

A. The first thing I do, "Shy Guy" and "Blonde Girl" comes up towards the Mall entrance—where the bus stop was and "Mountain Man" headed around the (inaudible) display, he moved around the display on the other side. And the first thing I did was try to follow them because again I was concerned about his behavior. And I lost him. So I went back into the Music Land which was where I had been headed, I learned that Rob wasn't back yet and people there didn't have the knowledge to be able to help me. And so we just went on out to where my car was parked.

Q. What . . .

A. O.K.

Q. What happened after that, who all went out to your car?

A. My fourteen year old daughter and I.

Q. And what did you all do?

A. O.K. I planned to take my daughter back around to Leggetts to go back inside to show her some earrings so we headed, we were, I don't know if people are familiar with Valley Mall but we were in one corner . . .

Q. O.K., let me show you this [483] photograph, Exhibit Six, the Valley Mall and Route 33. Do you recognize this?

A. Right.

Q. O.K. And what happened next?

MR. BOBBITT: I'm sorry I didn't see where she pointed.

MR. ERVIN: (inaudible).

A. I went, I was parked, I was parked in the lot between J.C. Penney and Watson's, over here. O.K. And I drove in front of Penney's, right there is a stop sign. O.K., I stopped there because there was a car coming in here, I don't know which direction the car had come. But the car was just driving in here to the front Mall entrance. And the car that I saw driving in was a shiny dark blue car and of course, college was going to be starting Monday and so my instinct was here comes a rich college kid, is what I thought because she was beautiful. She was well dressed and she was happy, she was singing and . . .

Q. And did you get a good look at the woman that was driving?

A. Absolutely.

Q. Could you describe her for the jury?

A. Like I said, she was beautiful, she looked bright eyed, I assumed she was a college [484] student. She was black, she had, she did not wear glasses. She had . . .

Q. Let me show you Exhibit Number One and ask you if you recognize that?

A. Yes that is her.

Q. This is the woman you saw that day?

A. Yes.

Q. O.K., so you all, you were stopped at the stop sign right in here?

A. Right.

Q. What happened then?

A. We waited for her to come past and then I pulled, turned right and came up to the Mall entrance. The first thing, O.K., she stopped so I had to stop. Now the first, there was a vehicle in front of her that was also stopped and in front of that was, my memory is like a grayish mini van that had dropped off some, maybe high school age kids and it was waiting to leave. O.K., and the next thing that I saw was, "Mountain Man" came tearing out of the Mall entrance door and went up to the driver of the van and it looked like he was talking to him and then was just really mad and ran back and banged on

back of the backside of the van and then went back to the Mall entrance wall where "Shy Guy" and "Blonde Girl" [485] was standing. O.K., so then we left and there was a white pick-up truck in front of the black girl's car, may I call her Leanne now that we know that she is Leanne?

MR. ERVIN: (Inaudible).

A. O.K. In front of, O.K., in front of my car was Leanne's car and in front of Leanne's car was a white pick-up truck that was waiting for this van. The van left, the white pick-up truck pulled in front to turn left into the parking lot to park. And in fact, did that and well, O.K., before the, before the van, before the pick-up truck turned left, "Mountain Man" came out again to the O.K., he had pounded on the back of the bus and had gone back and then came up to the pick-up truck, this is the passenger's side of the pick-up truck. There was an older man and, appeared to be his wife and a teenage boy, appeared to be his son, in the pick-up truck and he just ran up to them, just look like, I don't know, nothing happened and came back immediately and pounded on Leanne's passenger's window.

Q. What happened then?

A. O.K., and he tried to, O.K., the pick-up truck then went into park. O.K., he shook and shook the car door and it seemed like it was [486] locked. And then he goes banging and banging on the window and she kind of leaned over and it then it looked as if she was actually making sure that the door was locked because then he yanked on the door again and it wasn't opened. And then he just really shook it hard and you could tell he was mad. Shook it really hard and the door opened and he

jumped in. Now this was a small car that had two, like two, appeared to be two bucket seats in the front and he jumped into the middle which is a little weird, you know, so I am trying . . .

Q. What he do . . .

JUDGE: Ms. Stolfus I am going to ask you to try to tell us what you heard without any comments.

MR. ERVIN: What did he do when he jumped into the car?

A. He just jumped into the middle of the car and faced her. There was some conversation and at first she kind of, you know, went like she was trying to push him away and then he got back over, he just moved back over and opened the passenger door and motioned for "Blonde Girl" and "Shy Guy" to come and "Blonde Girl" came, started to jump into the car, put her left foot up into the car and Leanne stepped on the gas [487] and honked the horn and just laid on the horn. The horn must have blown, blew a long time and she couldn't go because the three people who had been in the pick-up truck were now walking from the parking lot in front of her car into the Mall. O.K., but when she stepped on the gas to go forward, the "Blonde Girl" jumped back and of course didn't get into the car and so she is just laying on the horn now and "Mountain Man" started hitting her and hitting her . . .

Q. "Mountain Man" was hitting who?

A. Leanne Whitlock.

Q. Where was he hitting her at?

A. Well he started hitting her. It looked like he was just hitting her on the left shoulder, her right shoulder and then it looked like to me that he started hitting her on the head and I was, I just became concerned and upset. So I beeped, honked my horn and then she stopped honking the horn and he stopped hitting her and opened the door again and the "Blonde Girl" got in the back and "Shy Guy" followed and got behind him. When "Shy Guy" got in the back of the car, as he got in he handed his long tan coat over the front seat to "Mountain Man". O.K., "Blonde Girl" and "Shy Guy" got in the back and they were [488] sitting turned in their seats, kind of in an huddle with Leanne, you know, as if they were buddies or something. So "Shy", excuse me, "Mountain Man" had taken the coat and was bent over, you know, put the coat down in the floor and fiddled with it, what seemed like a long time, fiddled with the coat. After he was done fiddling with the coat, he sat back up and again he faced Leanne and the other two in the back seat sat back and relaxed.

Q. What did you do then?

A. O.K. Well O.K., well I am still waiting to go so now they look like they are all, you know, ready to go and nothing is happening and Leanne is not (inaudible) the car is still running. O.K. so I beeped the horn. Just like, let's go, and nothing happened so you know, I, it just seemed strange so I didn't, you know, O.K., so I what I did was pulled up parallel, O.K., she is here and I pull up parallel and then I got out of the car, I tried, first I tried to get her attention and she was just like a manikin, just totally frozen. I could not get her to look at me or to respond. So I jumped out of the car, started to walk

around, "Shy Guy" quick, instinctively jumped, you know, laid over on the [489] seat to hide from me and the blonde girl starts ribbing him to get up and I was afraid to tell you the truth and I got back into my car and just pulled front a little bit, just like that, so that I could get a better view of Leanne.

Q. Did you say anything?

A. Yes I did. I said to her, well of course I am in my car and she is in her car, but I leaned front so my daughter wasn't in the way and I said three times to her, are you O.K., so that she could very clearly see that I was saying, are you O.K.

Q. And what was her response?

A. I was very frustrated because I didn't understand her response. Every time I said that, she would look at me, just have direct eye contact and then look down. Just very serious, looked down to her right. I couldn't figure it out.

Q. What happened then?

A. So I still (inaudible) I wasn't getting an O.K., I wasn't getting feedback that she was O.K., so I pulled front a little bit more and again waived and said, are you O.K., and it was like please talk to me. And she just mouthed a word which again I couldn't figure out what it [490] was and I pulled, I just thought, oh well, and I started to drive off and I drove just a couple car lengths forward to where that pick-up is and then I just parked because it just hit me what she said. Now I will just show you how she mouthed. She just went . . .

Q. Is that how she did?

A. O.K., yes. Now she didn't smile, there was no expression. She didn't move. It was just, and when I hit, when I got up to Medco Drug, I said to my daughter, I think she said help. It was the only think that that movement could be. It is the only word that it could possibly be, was help.

Q. What did you do then?

A. O.K. I said to my daughter, my fourteen year old daughter, now you must understand this is about seven o'clock at night and we haven't had supper yet and you know, I said to my fourteen year old, go in quick and get the Security and she didn't want to and I am there arguing with her. Well I don't want to go, I want to see what happens here because she said help, I'm sure, you know, I think she did, I'm not.

Q. Well what happened then?

A. O.K. Well about that time, we were [491] there just a few, just a short time when Leanne then just drove by me very slowly in the car with these people in it, drove around, I can show you on here. O.K. The Mall entrance is right there and . . .

Q. And is that where all this happened, is right there?

A. Right, at the Mall entrance. Medco Drug is here so I just pulled up to Medco Drug and she then came around and drove past me very slowly, came up around the corner here, O.K., I will tell you the details of what happened here, they basically went out here to this stop sign and then turned left out here.

- Q. What happened (inaudible)?

A. When she came around, when she came past me and she came around the corner, and I am still sitting there trying to figure out if she is O.K. or if she isn't O.K., she came around the corner, it seemed like she stepped on the gas and then she went up over the curb and now the curb is about that high and so the car really tilted and also she laid on the horn again. And I said we have got to follow her. So I quickly drove up behind her and I said to my daughter, I had a 3 x 4 index card in the car and I said to my fourteen [492] old daughter, write down the license number, you know, it was West Virginia, NKA 243 and I said help me to remember, No Kids Alone 243, and I said remember, 243 is my age.

Q. What was the license number?

A. NKA 243, West Virginia.

Q. NKA 243. Let me show you Exhibits Four and Five and ask you if you recognize the vehicle in these photographs?

A. Yes that is John Dean's car. (Inaudible).

Q. Now the car has quite a bit of mud and dirt on it . . .

A. The mud was not there when I saw it, it was, it looked like it was a brand new car, it was real shiny.

Q. And which direction was this car going the last time you saw it?

A. Well west, east basically.

— Q. Which way did it go?

A. O.K. It went up over the curb here and I followed it. We came out here to the stop sign and it turned left, the first thing that she did is headed in this lane as if she was going back to Harrisonburg and I (inaudible). She was going back to Harrisonburg and I was going to [493] follow her then I, she changed lanes and, and headed out here, out 33 east toward Elkton. Now it was dark and I had a empty gas tank, I had three kids at home waiting for supper . . .

Q. (inaudible)?

A. I decided not to follow her at that point, I don't know Elkton area and I didn't have any gas and I didn't have any money to get gas so I decided to turn right and go around and call the police. And we headed back to the, back around to the other side of the Mall, over here where the theaters are, where there are pay, public pay phones. We drove up there and I am thinking what am I going to tell the police.

Q. O.K. So that is all you saw with the car and the people, is that correct?

A. Right, that's all I saw.

Q. Now Leanne, this man you call "Mountain Man" that you saw running up and force the door open and then jump in and then hit Ms. Whitlock a few times, is he here today?

A. Yes sir.

Q. And where is he sitting?

A. He is seated right there.

Q. In the white shirt?

A. Right.

[494] MR. ERVIN: Judge I would ask that the record show that the witness identified the defendant in this case.

JUDGE: So ordered.

MR. ERVIN: And you got a good look at these people, is that correct?

A. Yes I did.

MR. ERVIN: Anne this is Mr. Roberts and Mr. Bobbitt. They may have some questions.

MS. STOLZFUS: O.K.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Stolfus when did you go to the police and tell them what you just told us?

A. Well I actually didn't go to the police. They came to me.

Q. When was that?

A. A week and a half after this happened, on a Wednesday I was in a class talking to one of my, talking to some of my classmates and didn't make the association at that time, but was just telling her about this crazy car that I had seen and she called the police and reported my story to the police and the next night, Thursday [495]

night, a detective came to my class at JMU, I'm a full time student there . . .

Q. So you are saying a week and a half after this, you talked to the police about it.

A. That's right.

Q. Had you seen the newspaper reports of a girl being missing in the meantime?

A. No sir I hadn't. I had known . . .

Q. Why, why were you telling the girl at this class about the story?

A. Well we were just talking about, we were talking about Leanne. By that time her body had been found and I'm a full time student, I was there everyday when this happened. The whole campus only talked about Leanne Whitlock. So it wasn't anything unusual . . .

MR. BOBBITT: (INAUDIBLE).

MR. ERVIN: Judge could she be allowed to finish her answer?

JUDGE: Yes and I would ask that you just answer the questions that you are asked.

MS. STOLZFUS: O.K., I'm sorry.

JUDGE: (Inaudible).

MR. BOBBITT: You had seen publicity then about the person who was missing and the body found?

[496] A. No I hadn't.

Q. I don't understand. You said, you were just saying that you knew all of that?

A. Right, just from students discussing it everyday in class.

Q. So you talked to students . . .

A. Right.

Q. About this?

A. Right.

Q. And you knew, knew that an abduction had taken place and that a body had been found?

A. Right.

Q. And that's why you were telling the story to the girl in the class, told what you had seen?

A. Right. But I didn't make the association.

Q. O.K. But she did and then the police came to talk to you.

A. Right.

Q. And did you tell the police the, what you just told us at that time?

A. I told the police exactly what I saw, right.

Q. And then were you interviewed later by a different police?

[497] A. I was interviewed very briefly by the one detective who came to JMU that Thursday evening to my class and he asked me to come to the police station the next morning and I talked to Detective Claytor. And each time I spoke to the police, it was always to Detective Daniel Claytor.

Q. O.K. And since then have you talked to anybody from the Augusta County Sheriff's Department?

A. I talked, I'm sorry.

MR. ERVIN: I'm sorry Judge. I didn't hear the question, I apologize.

MR. BOBBITT: I asked if she talked to anybody from the Augusta County Sheriff's Department? Have you talked to anybody from there?

A. There was a gentlemen who came to my house with Mr. Ervin last week but that is the only time.

Q. So you went, you told Mr. Ervin what had happened, what you observed?

A. Right.

Q. And then did you talk to a newspaper reporter about it.

A. Last week a reporter called me from the Roanoke newspaper.

[498] Q. And you told him what had happened? What you had observed?

A. Briefly.

Q. O.K. So you told several people about it, several times, starting with the girl in the class (inaudible) police officers? This isn't the first time that you have recited what you just talked about?

A. No.

Q. In the meantime, have you seen some of the newspaper articles about the story?

A. I saw only some of the JMU papers about it, that were just laying around campus, that's all.

Q. And you heard the talk that was around campus at the time?

A. Right.

Q. You said that you saw these three people at the Mall, the two men and the woman and that you, the woman was, there was a name that the woman was referred to . . .

A. Right.

Q. What was that name?

A. Donna or Sharon, is my memory.

Q. They are not that similar. Can you explain why you think it was one or the other of [499] those names?

A. Because my memory is that "Mountain Man" was calling her Donna and when I asked her if she was Donna, and my memory is she said well Donna or Sharon.

Q. And where was that that you talked to her? Was that in the record shop?

A. Just outside of that shop, in the main corridor of the Mall.

Q. And then you said that this man that you had seen earlier, when you were outside the Mall, in your car behind the blue car with the girl in it, you said the man came out and banged on a van in front of it? Is that, did I understand that correctly?

A. That was my memory first.

Q. Uh, hum. That he came out, and there were people letting school age kids out . . .

A. Well I thought it was some little mini-bus or something. I don't know what it was.

Q. I just, and the person banged on that van?

A. Right. Well just at the back in anger when he couldn't get a ride. I thought it was he was trying to get a bus ride.

Q. O.K. And then there was a white [500] pick-up and the person talked to the people in the white pick-up truck?

A. I don't think he talked to them. He ran up to them and I don't have any memory that he spoke to them. He just ran up there briefly and then ran back to Leanne's car.

Q. When the blue car went out of the parking lot, changed lanes on 33, excuse me, went west, could you see who was driving at that time?

A. Well it was Leanne and they obviously hadn't changed drivers.

Q. She was driving then?

A. She was driving, right.

Q. When the police came and talked to you about what you had seen, did they show you some photographs at that time?

A. Detective Claytor showed me one set of photographs the first Friday afternoon. I talked to him Friday

morning and he had me come back Friday afternoon, then Monday morning I came back again and he showed me another set of photographs and Wednesday he showed me the third set of photographs.

Q. And did you pick the person out of that group of photographs who you had seen at the Mall?

[501] A. Yes, I was very sure of the two men I was shown. I was shown "Mountain Man" on Friday afternoon and I was one hundred percent sure because of the profile and the distinctive nose. Monday I was confident of the identity of "Shy Guy". The "Blonde Girl", I was a little bit less sure of.

Q. But you eventually picked all three out of the photos you were shown?

A. I pointed to three photographs. I don't know, I never had any response from the police as to whether it was a correct person or not.

Q. I'm asking about you. You picked out three photographs as being the people that you saw?

A. I picked two with absolute certainty and the third with a slight reservation.

Q. Who was present when these photographs were shown to you?

A. Detective Claytor and myself.

Q. And was this at your home or was it at . . .

A. No this was in the police station.

Q. And how many photographs did you look at at a time?

[502] A. I looked at six.

Q. In a group?

A. In a group.

Q. And was anybody else present when you did that?

A. No.

Q. Did, was this over a period, you said something about looking at one group and then picking out the other man later. Was this over a couple of days or was this all at the same time?

A. Well O.K., well Friday morning I spoke with Detective Claytor first. I gave detailed descriptions of the three persons and he said that I should come back after my classes Friday afternoon, that he had some pictures he wanted to show me. He showed me one set of six pictures and simply, in a very professional manner, asked me if I recognized any of these persons?

MR. BOBBITT: O.K.

A. And then Monday morning, I, he gave me another set.

Q. All right. So I see, you were there Friday and then you were there Monday also?

A. Right. But it was a different set of pictures, different persons.

[503] Q. And have you seen those photos since then?

A. No I haven't.

Q. Have you seen photographs in the newspaper or of Mr. Strickler?

A. No I haven't.

Q. Seen any of the television coverage of Mr. Strickler's arrest?

A. Not of his arrest. I saw T.V. last, coverage last night at eleven o'clock news. That's the only coverage I have seen.

Q. Was there a picture of Mr. Strickler on there?

A. Last night?

Q. Uh, hum.

A. Yes. I very carefully avoided watching the news because this whole incident was very distressing.

Q. O.K. Did your seeing those photographs and seeing the television picture last night, influence your identification of Mr. Strickler today?

A. Absolutely not.

Q. How can you say that?

A. Pardon me?

Q. Why do you say that?

[504] A. I had, first of all, I have an exceptionally good memory. I had very close contact with him and he made an emotional impression with me because of his behavior and I, he caught my attention and I paid attention. So I have absolutely no doubt of my identification.

MR. BOBBITT: May I have just a minute Judge. Ms. Stolfus do you think you could also identify the other two people that you saw in the Mall?

A. I am confident that I could identify the man I called "Shy Guy". Like I say, I got very close to him and I looked up very close, at close range and apologized and he smiled and I am very confident that I could identify him. I am less confident of the girl, I must admit. I know what she looks like but I have seen at least two girls that look very similar and they both look like her so that becomes confusing.

Q. Do you know the name of the person whose picture you identified?

A. No I don't. I was never told.

Q. The girl I am talking about?

A. No I don't. I have no idea. I don't know the gentlemen's names either.

Q. I want to get back to the, you had [505] some conversation with the woman you said?

A. Right.

Q. Was that when, you had said something about hooking the button in your blouse. Was that when you had the conversation about the name?

A. No that was right after that. She spoke briefly with "Mountain Man" and then turned to go and then he called her again and she turned around while she was walking and just walked right into me.

Q. Did he use a name when he called her?

A. I think at that point he was just yelling. He was really revved up.

Q. And so that wasn't when you asked her if her name was Donna?

A. No, initially when he, he was yelling and calling her name and then I, it looked as if he was looking at her and so I stopped her and said are you Donna, the person he is calling?

Q. Yet to spite that close contact and conversation, you're not as sure about her identification?

A. I saw a girl that I thought was her, I thought I saw a picture of her, but I saw a [506] witness today in that room out there that look like her too and that is very distressing to me. But I can give you detailed description of what she did in fact look like.

Q. What did she look like?

A. Well she was about five-four. She was heavysset. She was large busted. She was wearing blue jeans and a white top exactly like the girl who is a witness, who is sitting out in that room. She had blonde hair, it was kind of in a shaggy cut down the back. She had blue eyes, she had a real sweet smile, kind of a small mouth. Just a touch of freckles on her face. Kind of a wide roundish, square face. She was, O.K., like I say, she was wearing a white top and blue jeans and sneakers. I must say I had no idea I was witnessing an abduction so I wasn't paying that much attention to all of those details and it was January 5th and this was a few months later and I haven't seen the media to, to have any reinforcement of any memory.

MR. BOBBITT: I don't have any other questions.

MR. ERVIN: Judge before (inaudible) I would (inaudible).

JUDGE: (Inaudible).

[507] MR. ERVIN: I would ask that this bag stay with Exhibit Number Seven that has been introduced by the Commonwealth Judge.

JUDGE: The bag stay with it?

MR. ERVIN: Yes sir.

JUDGE: All right.

MR. ERVIN: Thank you Judge. I have no other questions of this witness Judge.

JUDGE: (Inaudible).

MR. ERVIN: Yes sir.

JUDGE: Any more questions for Ms. Stolfus?

MR. BOBBITT: Not at this time.

JUDGE: All right.

MR. ERVIN: Your Honor may this witness be excused?

MR. BOBBITT: Your Honor we would, we do not want her to be excused at this time.

JUDGE: All right. Ms. Stolfus you will have to stay with us please. Do not leave the presence of the Court. Thank you.

MR. BOBBITT: Your Honor we have a motion to make outside the presence of the jury (inaudible).

JUDGE: We are going, members of the jury, we don't have you on a starvation jury list. [508] We just want, (inaudible). We are going to stop for lunch now. It is ten minutes after one. Will an hour be time enough for you (inaudible)? Now members of the jury listen to me now. Do not discuss the case with anyone. Do not allow anyone to discuss it with you. Everybody be seated. Do not allow anyone to discuss it with you. If there are any media accounts of this trial, ignore them. If anyone tries to influence you by any, by talking to you or showing something to you or something of that nature, ignore them entirely. When you return, return to the juryroom. Do not return to the Courtroom. You may go on to lunch now. I'm going to ask everybody in the Courtroom to remain seated until the jury is gone. Mr. Bobbitt.

MR. BOBBITT: Your Honor at this time we would like to move to strike the identification of Ms. Stolfus on the grounds that she was shown pictures which she picked out, identified apparently Mr. Strickler from these pictures and that that identification must have had an effect on her to spite what she says today in Court and that when she was shown those pictures of what amounts to a photo line-up, she said she saw six pictures in a row. She was shown a photo line-up. [509] No attorney for the defendant was permitted to be present or was present at that time. That was over two and a half weeks after the abduction. Mr. Strickler had been arrested at that time. He was represented by an attorney in Harrisonburg at that time and yet his attorney was not given the opportunity and obviously wasn't present to see, to

observe the photo line-up and we would object to it on that grounds.

JUDGE: Mr. Ervin.

MR. ERVIN: May it please the Court. Your Honor first off this witness was shown a photo line-up, not just a single picture and asked if this is the man and not a photo line-up. There has been absolutely no evidence at all brought by the defense to show that this photo line-up was unduly suggestive in anyway. And Judge under Virginia law there is no reason to have the defendant or his attorney present at a photo line-up. Now a line-up with the defendant taking part in it, the defendant would have the right to have an attorney there, but not in a photo line-up. Judge I would refer the Court's attention to (inaudible) v. Commonwealth, decided November 15th, 1988 in the Court of Appeals where the witness was shown just one picture of the [510] defendant and said that's the man and the Court said that was permissible based on the totality of the circumstances the witness still had a good impression of the defendant and allowed that evidence to come in and we just ask that this motion be overruled at this time.

JUDGE: Mr. Bobbitt any further?

MR. BOBBITT: No sir.

JUDGE: Mr. Bobbitt I am going to overrule your motion and I will note your objection to the ruling of the Court.

MR. BOBBITT: Thank you sir.

* * *

[511] MR. ERVIN: Call Kurt Massie.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Kurt Douglas Massie.

Q. And where do you live sir?

A. Right now in Middlebrook, Virginia.

Q. Are you employed?

A. Mastic, in Stuarts Draft.

Q. How long have you been employed?

A. Nine years.

Q. Nine years?

A. Yes sir.

Q. Mr. Massie I direct your attention back to January 5th, 1990, of that evening. Did you work that day?

A. Yes sir.

Q. What time did you get off from work?

A. Seven o'clock.

Q. And where did you go after you got [512] off from work?

A. Well I had to go down and pick up my daughter. I was separated and the only way I could see her and

keep her was to go down and pick her up and take her down to my parents which they live in Grottoes.

Q. O.K. And where were you going to pick her up at?

A. Grottoes.

Q. O.K. Which way did you go?

A. Down 340.

Q. You know why we are here today. Tell the jury what happened.

A. Well we had just, we got off and went straight down. Got down 340, a car was coming up and we had to slow up because one of them kind of come around the car, went to turn off, he didn't give no signal. There was a big commotion there and we kind of slowed up, watched this car turn in. It looked like a bunch of people in it. When it turned in, I seen a guy and a girl, who was setting in the front and another guy in the back. They pulled off the road and just kind of set there a little bit. There is a road going in the woods, instead of taking the road to the woods, they turned and went down along [513] the field so we just pulled over and watched. We thought they were going to get stuck, is what we thought. And they went all the way through the field so once they went down and out of sight, we left.

Q. And you say you all slowed down. Did you see inside the other vehicle?

A. I could see the driver. I was on the passenger side and I could see the driver.

Q. Kurt let me ask you if you recognize this?

A. Yeah right here.

Q. What road is that right through here?

A. It is 340.

Q. O.K. And which road did they turn on, which field did they turn down in?

A. This one right here.

Q. Right in front of the sign?

A. Right in front of the sign. There is another little road right here. They stopped like they were going to go into that one and into the woods but they didn't take that, he turned in and went right straight up along this field.

MR. ERVIN: Judge I offer this as Exhibit Number Eight.

[514] JUDGE: Commonwealth's Exhibit Eight. Any objections?

MR. BOBBITT: No sir.

JUDGE: The photograph will be marked Commonwealth's Exhibit Eight and will be admitted into evidence.

MR. ERVIN: Do you know how many people were in the car at first?

A. To start with, it looked like, it looked like a bunch, looked like at least four. But when they turned off, the cars behind them, we could see in good. It was a guy

and a girl setting up front and another guy setting in the back and he had his arm laid across the seat, just kind of like this. He had (inaudible) girl (inaudible). The driver when he turned, when he went to pull off, he turned and looked right at us. We were just sitting. We had done come to almost a complete stop, sitting and watching.

Q. And did you get a good look at . . .

MR. BOBBITT: Mr. Ervin.

MR. ERVIN: I'm sorry.

Q. Did you get a good look at the driver of this vehicle?

A. Yes sir I did.

Q. What kind of vehicle was it? Could [515] you describe the vehicle?

A. Yes. It was a dirty, it was a dirty looking (inaudible). We thought then that they had been out partying or something, riding around in a field. It was a blue looking car (inaudible). It was really muddy looking. We watched it when he turned off. He just kind of set there. Even the driver himself turned. He acted like he didn't know which way to go. It was, like I said, it was a road right straight in the woods, instead of taking that road, he turned. Turned the car and went around like this.

Q. And you got a good look at the driver?

A. Yes sir.

Q. How far away would you say he was when you . . .

A. Well he was right on just the opposite side of the road. I would say eight to ten feet at the most.

Q. The man that was driving this little blue car when it turned down into this field. Is he here today?

A. Yes sir.

Q. And where is he seated?

A. Right there.

[516] Q. The man in the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask the record to show that he identified Mr. Strickler, the defendant.

JUDGE: So ordered.

MR. ERVIN: About what time of night was this?

A. I'd say right around seven-thirty because we never made no stops, we come right on through.

Q. Were you aware of this road through the field?

A. Yes.

Q. And how did you know it was a road through the field?

A. Well I was raised around this area. And on back years ago, I'd say ten or fourteen years ago, we use to go in there and we didn't have nobody to fool with us, we would go in there and drink beer and whatever, and that's how I knew the road was there.

Q. And you say you were afraid they were going to get hung up down there?

A. Yes, that's why we pulled over and stopped and watched. We figured that they were [517] going to get stuck and we was going to go back and help them.

Q. And did you ever see the other man in the car?

A. No he never would turn around. He kept, he was turned to the side the whole time with his arm up on the seat, back seat.

Q. How about the girl, did you ever get a look at her?

A. Never did.

Q. But you can identify the defendant as the driver?

A. He turned and looked right at us.

MR. ERVIN: O.K. This is Mr. Bobbitt and Mr. Roberts. Would you answer their questions please.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Mr. Massie you said that as you got to this point in the road that, you mentioned we, who was with you in the car at that time?

A. I had another friend of mine that worked with us. We were getting off from work. See I didn't have a license, a driver's license.

[520] Q. All right. And then the car, the slower car turned into this lane?

A. Yes.

Q. That you knew about?

A. Yes.

Q. So you weren't surprised that it turned then because you knew . . .

A. The way it had done slowed up, I figured they were just going to pull over. They just kind of made a turn and just kind of set there like he didn't know which way to go.

Q. And you say you saw four people in the car?

A. I thought it was until they turned. When they turned, there was cars behind me, there was cars behind me, you could see lights, it wasn't but three people in that car when they turned. But when they were coming down 340, we just almost stopped to let the cars, because the cars went around then. We kind of slowed up and when we did, the car come back in at us and we could see, I could see the car, it looked like a bunch of people in the car is what it looked like until they turned off, actually turned off and the cars behind me, I could see right in the car and [521] it wasn't but three people in the car.

Q. How were you able to see in the car so well, I mean this was after dark, wasn't it?

A. Yes sir. Well the cars, there was lights, cars all behind him and there were two or three other cars behind them.

Q. So the headlights of the other cars . . .

A. Headlights of the other cars and then our headlight off of ours, when he turned, I could see, the only reason I could see him was the headlights off of our vehicle.

Q. Off of your vehicle?

A. He was like this and we were like this.

Q. Uh, hum.

A. That was just the way it was. He was looking right at me. He just turned before, before he made the turn to go over, he didn't know where he was going. He just kind of set there for a little bit. He wasn't going, I'd say three miles an hour before he turned off the road. He acted like he didn't know where he wanted to go. And then once he did turn off, he just set there. So when he did, we eased over.

Q. So at that point he would have been [522] out of your lights, is that right?

A. He was right at, right beside us. We was like this. The guy that I was riding with, he is blind in one eye and you know, he is kind of skeptical of vehicles you know, and he kind of, we slowed way up because we didn't know if anymore cars would come out around them or what was going to happen because this guy hadn't given no signal or nothing. He was almost just kind of setting in the road before he turned off.

Q. So was the fellow that was driving you, could he see . . .

A. He could see . . .

Q. Vehicle also?

A. He could see the cars. He knew exactly, he could identify the car, yes, no problem. But as far as, he was trying to keep his eye on the road and the other traffic coming . . .

Q. So he couldn't see who was in the car?

A. We just ended up pulling over. We just ended up pulling off the road completely and we just set and watched him as he drove through the field, wanted to see if they were going to get stuck or what.

Q. And you couldn't see who was in the [523] car at that point, could you?

A. I seen it when they first come up . . .

Q. I understand, but I am talking about after they . . .

A. After they turned off, no. After they started through the field no, it was no way.

Q. Now was the girl in the front seat, was she a white girl or a black girl?

A. White girl.

Q. White girl?

A. Yes.

Q. And the fellow in the back seat, was he white or black?

A. White.

Q. And you could tell that from . . .

A. Yes. I could tell that as, before they turned off but I never could see their faces, his face was the only one that I could see.

Q. Do you know Mr. Strickler?

A. No sir I don't.

Q. He is not somebody you knew before . . .

A. No sir.

* * *

[529] MR. ERVIN: Thank you. Call Carolyn Brown.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your name please?

A. Carolyn Brown.

Q. O.K. Now Ms. Brown direct your attention back to the night of January the 5th, 1990, do you remember where you were that night?

A. In at Dice's.

Q. You were at Dice's Inn?

A. Uh, hum.

Q. And where is that located?

A. In Staunton, I couldn't tell you.

Q. Who all were you with that night Ms. Brown?

A. Debbie Sievers and Nancy.

Q. Ms. Brown do you know why we are here today?

A. Uh, hum.

Q. Did anybody come into Dice's that night that attracted your attention?

[530] A. No . . .

Q. Just tell the jury what happened, what happened that night Carolyn?

A. Well not really. Just, I don't know.

Q. O.K., let me ask you this. Did you talk to the police about this case?

A. Well one from Harrisonburg, yeah.

Q. Tell us about these two men that you saw at Dice's Inn. About what time did they arrive?

A. Between, it was between nine and nine fifteen when I seen them.

Q. And was anybody with them when they came to Dice's?

A. No.

Q. Did you ever get to talk to the two men at Dice's?

A. Just very little, but not very much, very little.

Q. Which one did you talk to?

A. Well mainly Ron.

Q. O.K. Do you know Ron's last name?

A. No I don't.

Q. How about the other man, do you know the other man's name?

[531] A. I only knowed him by Stoney, but that's it.

Q. O.K. This man Stoney, when he came in, how was he dressed?

A. Well I didn't pay all that much attention to him but he was dressed right nice I thought.

Q. What kind of pants did he have on?

A. Well they were blue but I don't know what, really what kind of material it was.

Q. Were they clean or dirty?

A. Well a little bit dirty.

Q. O.K. What do you mean dirty, little bit dirty? What do you mean?

A. Well like they had been wore a couple days or so.

Q. The man that you call Stoney, is he here today?

A. Yes he is.

Q. Where is he seated?

A. Settin' right over there.

Q. In between these two . . .

A. Right between these two men?

MR. ERVIN: O.K. Judge I would ask that the record show the witness identified the defendant.

[532] JUDGE: So ordered.

Q. How long did you stay at Dice's that night Carolyn?

A. Stayed there until one.

Q. O.K. How about these two men? How long did they stay?

A. Well they were there when we left. We left there at one.

Q. O.K. So they did not leave before you?

A. No.

Q. Did you ever see Stoney here get with anybody else that night?

A. Well some girl, I don't know who it was. Her name was Donna, I think it was . . .

Q. O.K.

A. That's all.

Q. Was she there before or after they got there?

A. She was there before.

Q. She was already there?

A. Uh, hum.

Q. About what time had she gotten there?

A. Around eight.

Q. Did you see the vehicle that these [533] men were in?

A. Yes I did.

Q. O.K. How did you happen to see that?

A. Well when we was going out and I was standing out there beside the door and I happened to see them ride by and they was, I reckon, they was hunting for us because, they wanted to follow us (inaudible), I don't know, that was the only time I seen them is when they rode by the building and I seen them sitting in it.

Q. Carolyn let me show you Exhibits Four and Five, photographs of a vehicle.

A. O.K.

Q. Do you recognize that vehicle?

A. Uh, hum, that's it.

Q. And who was driving the vehicle when it went by?

A. Well at the time it was Stoney driving.

Q. Now Stoney, you mean this man here?

A. Uh, hum.

Q. Did anybody leave with him when they left?

A. Donna.

Q. Donna did?

[534] A. Uh, hum.

MR. ERVIN: Carolyn this is Mr. Bobbitt, he may have some questions for you.

MR. BOBBITT: No questions.

MR. ERVIN: Thank you Carolyn. Your Honor may this witness be excused?

MR. BOBBITT: No objections.

JUDGE: Yes.

MR. ERVIN: Thank you.

MS. BROWN: Uh, hum.

MR. ERVIN: Call Debra Sievers.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Debra Lynn Sievers.

Q. O.K., Ms. Sievers, do you know Carolyn Brown that just testified?

A. Yes I do.

Q. Direct your attention back to January 5th of 1990, where were you all that night?

A. Dice's Inn.

* * *

[536] Q. How was Stoney dressed that night?

A. He had on a tank top that was low cut under the arms and he had on, looked like jeans, but they wasn't jeans, they was jean material and boots.

Q. Did you notice anything about his jeans in particular?

A. No.

Q. Were they clean or dirty?

A. They were a little dirty.

Q. Little dirty?

A. Uh, hum.

Q. O.K. And you say he had a tank top that was cut low under the arms?

A. Uh, hum.

Q. How about this shirt, do you recognize this?

A. No.

Q. This is not the one he had on then?

A. No audible answer.

Q. After you saw them that night, how long were you all there?

A. Well we got there at seven and we left around two.

* * *

[539] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your name please?

A. Nancy Simmons.

Q. Nancy do you know Carolyn and Debra that just testified?

A. Yes sir.

Q. Going back to the night of January 5th, 1990, were you with them that night?

A. Yes sir.

Q. Where were you all?

A. At Dice's Inn.

Q. And about what time did you all get there?

A. Probably about seven.

Q. Later that night did you dance with a man quite a bit?

A. Yes, two of them.

Q. Two of them. Did these two men come in together?

A. Uh, hum.

Q. The two men that came in together, do you know their names?

[540] A. Stoney and Ron.

Q. Stoney, is he here today?

A. Yes, Tommy . . .

Q. Right here?

A. He wouldn't tell us Tommy, he said Stoney.

MR. ERVIN: Judge I would ask that the record show that she identified the defendant.

JUDGE: So ordered.

MR. ERVIN: About what time did they get there?

A. I think it was around nine or a little after.

Q. And how long did they stay there Nancy?

A. Until it was over, about twelve-thirty or one.

Q. Did they leave before or after you did?

A. About the same time.

Q. Did anybody leave with them when they left?

A. Yes.

Q. Who left with them?

A. Donna Kay.

Q. Was Donna Kay there before they [541] arrived?

A. Yes, we saw her.

Q. The other man that you called Ron, did he tell you his last name?

A. No.

Q. Did you dance with him?

A. Yes.

Q. During the night while you were dancing with Ron, did he give you something?

A. Yes.

Q. What did he give you?

A. A watch.

Q. Let me show you Exhibit Number Three and ask you if you recognize that watch?

A. Yes.

Q. And where have you seen this watch before? Is this the one that he gave you?

A. Yes.

MR. ERVIN: Judge at this time we would ask to introduce Exhibit Number Three into evidence.

JUDGE: Mr. Bobbitt.

MR. BOBBITT: No objection.

JUDGE: The watch which has previously been identified for identification for Commonwealth's Exhibit Three will be admitted [.]

* * *

[548] MR. ERVIN: Call Mark Wood. Come up and have a seat Mr. Wood.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Mark William Wood.

Q. Do you know the defendant, Tommy Strickler?

A. Yes sir.

Q. Are you related to him?

A. I'm his second cousin.

Q. Mr. Wood I direct your attention back to January 11th, 1990, 10th or 11th of 1990, did you see Mr. Strickler one of those days?

A. Yes sir.

Q. And when did you see him?

A. He walked up to my house and told me [549] his car wouldn't start.

Q. And what did you do?

A. I walked down the road and pushed it out of the road and tried to get it started and I couldn't get it started.

Q. Do you remember what type of car it was?

A. I think it was a blue Mercury Lynx.

Q. O.K. Let me show you Exhibit Four and Five and ask you if you recognize the car in those photographs?

A. Yeah, that's it.

Q. Is that the car Mr. Strickler had?

A. Yes sir.

Q. Did he tell you where he got this car from?

A. He said it was a friend or his girlfriend's, I don't quite remember.

Q. O.K. A friend or a girlfriend's?

A. Or a girlfriend, one of the two.

Q. And where did you all push it to?

A. Right down the road into a church parking lot.

Q. Is this a photograph of the church you all pushed the car to?

A. Yes sir.

* * *

[558] MR. ERVIN: Call Dan Holsinger.

CLERK: Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. HOLSINGER: I do.

CLERK: Mr. Holsinger please go across and take the witness stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Please state your full name please.

A. Daniel (Inaudible) Holsinger.

Q. And what area do you live in Mr. Holsinger?

[559] A. North of Waynesboro on 340.

Q. And what is your occupation?

A. I'm a Dairy Farmer.

Q. Mr. Holsinger I direct your attention back to January 11, 1990. Do you remember what you were doing that day?

A. Not sure about it. Is that on a Saturday, was it? I thought it was on the 13th.

Q. O.K. I'm sorry, 13th. I need to get my dates straight.

A. O.K.

Q. January 13th, what were you doing that day?

A. We were in the process of harvesting, picking a little corn in a field owned by someone else.

Q. O.K. Let me show Exhibit Number Eight and ask you if you recognize that scene?

A. Yes, uh, hum.

Q. And is, which field were you working?

A. This little patch right in here. It is about a ten acre stretch right there.

Q. O.K. Was anybody with you over there?

A. Had my two sons with me, one at one [560] time and then the other one came later.

Q. While you all were out there working, did you all find anything in the field?

A. Not anything down in here, no, not at all.

Q. O.K. How about any place else?

A. Well when you came in, that was early in the afternoon, I noticed a hat laying right up in this area right up here. I was in a hurry so I didn't bother with it, I went on in. And then a little later on when we came back with the machinery to start picking corn, my son was with me and he seen the hat too, and I said well pick it up and see what it looks like, looks like a right nice hat. So that was kind of what started the ball rolling, you might say.

Q. O.K. Did he pick the hat up?

A. Yes he picked the hat up and then he, and then somewhere right there close he picked a wallet, or some kind of a billfold or something up.

Q. O.K. And did he pick anything else up at that time?

A. Not at that particular time, no.

Q. The billfold, what happened to the billfold?

[561] A. Well we, he brought the hat and billfold and I opened it and looked at it and I just went on. And we went on about our work and we worked for a couple of hours there, had problems, so we went back to the

house and had to get another tractor and as we got back to the house, we laid it, it was wet, of course it was frozen and everything else. And we laid the wallet under the stove, wood stove there just to kind of dry out some, and we let it lay there and actually we didn't bother it any until we came back that night and was eating supper again.

Q. Did you examine the billfold at that time?

A. Yeah, we took it apart and kind of looked at it, trying to decide, it looked like somebody had just left it, it wasn't any big deal at all and we weren't really concerned about it.

Q. Was there any identification papers in there identifying who the owner was?

A. Yes, uh, hum.

Q. And who was the owner of the billfold.

A. Well it had Ronald, I think Ronald Lee Henderson, I think it was.

Q. Ronald Lee Henderson?

[562] A. I believe it was Lee, I know Ronald Henderson.

Q. Did you all find anything else in that field that day?

A. Right off, no, when I was coming back out, I noticed some type of garment laying on the ground and I was concerned about that. I went on my way and I just looked at it as I went by.

Q. Just left it laying there?

A. Right, uh, hum.

Q. And this billfold, did you turn the billfold over to the police?

A. Yes we, what happened there is we were getting ready to go out later that evening about six o'clock, the news came on and then that was when they showed Henderson's photograph on television and so we, my wife said well that's the guy in the wallet. And so that started things rolling there.

MR. ERVIN: O.K. This is Mr. Bobbitt over here, would you answer his questions please?

MR. HOLSINGER: All right.

MR. BOBBITT: No questions.

MR. ERVIN: Thank you Mr. Holsinger.

* * *

[563] MR. ERVIN: . . . Call Donna Kay Tudor.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. TUDOR: I do.

CLERK: Please take the witness stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Would you state your full name please?

A. Donna Kay Maddox Tudor.

Q. And how old are you?

A. Twenty-six.

Q. Ms. Tudor I direct your attention back to January 5th of 1990, do you remember where you were that evening?

A. I was at Dice's.

Q. Before you went to Dice's, do you know where all you went?

[564] A. I went to Vames and then I went to Boyd's and got my hair fixed.

Q. O.K., and what time did you get to Dice's?

A. Along about eight.

Q. And how long did you stay at Dice's?

A. Until it closes.

Q. Did you leave with anybody when you left?

A. I left with Tommy Strickler and a guy named Rebel.

Q. Tommy Strickler, is he here today?

A. Yes.

Q. Where is he seated?

A. Right there.

Q. In the white shirt?

A. Yes sir.

MR. ERVIN: Judge I would ask the record to show that she has identified the defendant?

JUDGE: So ordered.

Q. What type of car did you all leave in?

A. In a little Lynx, Blue Lynx.

Q. Let me show you Exhibits Four and Five and ask you if you recognize those?

A. Yes that's the car we left in.

[565] Q. What was Mr. Strickler wearing that night?

A. A black (inaudible) shirt and a pair faded jeans and a belt with a girl design on it.

Q. You don't know what kind of shoes he was wearing?

A. Reeboks.

Q. Let me show you this shirt. Do you recognize this shirt?

A. Yes it was the shirt he was wearing.

Q. You sure?

A. Yeah I am positive.

Q. After you all left Dice's, where all did you go?

A. We took Rebel to check on some pot.

Q. And where was that at?

A. Harrisonburg.

Q. And what happened with Rebel when you were checking for pot?

A. Well two places they didn't have none, but the third place he come out with some.

Q. And what happened then?

A. He took and give Thomas seventy-five dollars to keep for him.

Q. And then what did Rebel do?

A. He was driving the car then.

[566] Q. While Rebel and Mr. Strickler were in the car, who all was in the car?

A. Just me, Tommy and Rebel.

Q. And were you in the front seat or the back seat?

A. Back seat.

Q. And did you hear what they were talking about in the front seat?

A. Tommy was setting back there with me.

Q. O.K. I'm sorry. What were they talking about?

A. They were talking about "it".

Q. About what?

A. "It".

Q. What were they saying about "it"?

A. They said they got in a fight with "it".

Q. Got in a fight with "it"?

A. Uh, hum.

Q. Well did they say anything else about "it" at that time?

A. They called it a name I would rather not say.

Q. You've got to say it, what did they call "it"?

[567] A. They said nigger.

Q. They said nigger. They called "it" a nigger?

A. Uh, hum.

Q. What happened then, did they say anything else about "it"?

A. They just said that they got in a fight and kicked "it" in side of the head.

Q. Who said that?

A. Tommy and Rebel.

Q. What was their attitude while they were talking?

A. Tommy was kind of calm but Rebel was kind of nervous, he kept looking over his shoulder.

Q. You said kicked "it" where? Who said they kicked "it"?

A. Tommy and Rebel.

Q. Mr. Strickler here and Rebel too?

A. Uh, hum.

Q. Did Tommy say where he kicked "it" at?

A. Back of the head.

Q. Back of the head. Did he say why he did that?

A. No he didn't.

[568] Q. Did they say what happened to "it"?

A. He said something about a crusher.

Q. Do you know what type of crusher they used?

A. Rock crusher.

Q. Rock crusher. Is that what they said?

A. No audible answer.

Q. How long was Mr. Henderson with you all that night, or Rebel, I'm sorry, how long was Rebel with you?

A. Not very long because he, when he was driving he just about hit a car head-on and Tommy got mad at him.

Q. What happened when Tommy got mad?

A. He pulled a knife out and told Rebel he'd take and, that he would stab him if he didn't cool it.

Q. What did Rebel say?

A. Calmed down.

Q. What happened to Rebel after that?

A. We took him to a house not far from his complex and let him off.

Q. Where did you and Mr. Strickler go then?

A. We went up to a motel at Blue Ridge.

[569] Q. And how long did you all stay in a motel?

A. Overnight.

Q. And where did you all go the next day?

A. We went to, went to Wintergreen.

Q. And do you know who he went to see up there?

A. Lynn.

Q. Lynn?

A. Lilly or whatever.

Q. And after that, where did you all go?

A. Went, we went to Vames, well we stayed in the woods that night and went to Vames the next day.

Q. And after that what did you all do?

A. We went to my stepfather's and got some of my clothes.

Q. And then what did you do?

A. Went to Virginia Beach.

Q. Why did you all go down to Virginia Beach?

A. I went down to see if I could get a divorce.

Q. And how long did you all stay in [570] Virginia Beach?

A. Almost a week or something.

Q. And when you came back, do you remember what day you all came back on?

A. On a Wednesday.

Q. Where did you all go when you came back?

A. We went to his friend, Mark.

Q. Where did you all go after that?

A. Went back, went to, went back to Lynn, he got stalled.

Q. The pants that Mr. Strickler was wearing the night that he met you at Dice's, what happened to those?

A. His mom washed them.

Q. Washed them? Were they dirty?

A. Yeah. Had some blood on there and a little burn place.

Q. Some blood and a little burn place. And how about the shirt, do you know what he did with the shirt?

A. He took it off and washed it.

Q. Do you know what happened to it after he took it off, did you ever see it again?

A. He put it in the dryer at his mom's.

Q. Donna did you see Mr. Strickler's [571] hands that night?

A. Yeah, he had a place on his knuckle.

Q. What kind of place on his knuckle?

A. Looked like he had been fighting.

Q. Did you ask him about it?

A. Yeah, he said he was in a fight.

Q. In a fight. Did you know Leanne Whitlock?

A. No.

Q. Did you ever see anything in the car about Leanne Whitlock?

A. Yeah, I seen a driver's license and I.D.

Q. Where were those?

A. In the glove compartment.

Q. Driver's license and I.D., was there anything else in the glove compartment?

A. Yeah, it was a bank card.

Q. A bank card. Whose name was that in?

A. Leanne.

Q. And what did you all do with the bank card?

A. Well Tommy, he left it in there, when we were in Virginia Beach he tried to get some money out but . . .

[572] Q. He tried to get some money out? Did Tommy Strickler tell you where he got this car from?

A. No he said he bought it from some man.

Q. Did he tell you how much he paid for it?

A. Five hundred.

Q. Donna let me show you Exhibit Number Two, a pair of pearl earrings. Do you recognize these?

A. Yes they are the ones that Tommy give me.

Q. Who gave them to you?

A. Tommy.

Q. Is that the defendant?

A. Yes.

Q. When did he give these to you?

A. In Virginia Beach.

Q. And you were finally arrested up here, is that right?

A. Yes.

Q. And after you were arrested, what did you do with the earrings?

A. Give them to the police.

* * *

[574] Q. In the oil. After the car broke down, where did the car break down, where did you all leave it?

A. At a church.

Q. Did you go some place after the car broke down?

A. Yeah, we went to his mom's.

Q. And who took you up there?

A. Mark.

Q. Mark did? And were you eventually arrested?

A. Yes.

Q. And what were you charged with?

A. Grand Larceny.

Q. Is that charge still pending against you?

A. Yeah.

Q. And where is that at, that charge?

A. In Harrisonburg.

Q. In Harrisonburg. Was that for this car (inaudible)?

A. Yeah. Because I was seen in it.

Q. Was there any damage done to the car?

A. Yeah, Tommy, me and him got in an [575] argument about something and I did it.

Q. You are going to have to speak up now, (inaudible).

A. We and him got into a little disagreement about something and I didn't understand him.

Q. So what did he do?

A. He took his knife out of the dashboard.

Q. Where did he carry his knife at?

A. At his, on his side in a leather case.

Q. What type if knife was it? How long was it?

A. It was a hunting knife, about like this.

Q. And you say he cut the car up some?

A. Yes.

Q. When you all abandoned the car, were there any footprints or anything on top of the car?

A. Yeah, where Tommy got on it jumping around.

Q. Let me show you these and ask you if you recognize those pictures?

A. (Inaudible).

[576] Q. Whose footprints were those on the car?

A. Tommy's.

Q. Tommy's. Why was he jumping on the car?

A. It got stuck in the mud.

Q. Where was this at?

A. Up somewhere in Wintergreen in a mountain area.

Q. Did he ever tell you why he kicked "it" in the head like that?

A. So "it" wouldn't give him no more trouble.

Q. So "it" wouldn't give him anymore trouble?

A. So "it" wouldn't give them anymore trouble.

Q. Give them anymore trouble. Did he tell you what type of trouble he was talking about?

A. No he didn't.

MR. ERVIN: Donna Kay this is Mr. Bobbitt over here, O.K., he will want to ask you some questions also, O.K.?

[577] CROSS EXAMINATION

BY MR. BOBBITT:

Q. Ms. Tudor are you presently being held in jail?

A. Yes.

Q. What is the reason for that?

A. Because somebody told some lies on me. Said I was going to run and I ain't.

Q. Said you weren't going to come to trial to testify?

A. I was coming.

Q. But that is why you are in jail now?

A. Yeah.

Q. When you were arrested in Harrisonburg, did the police talk to you then about testifying against Tommy Strickler?

A. Yes.

Q. And did you agree to testify against him?

A. Yes.

Q. And did you tell them at that time what you would say?

A. Excuse me?

Q. Did you tell them what you would say if they put you on the stand?

[578] A. No.

Q. You didn't tell them? Did they tell you what they would do for you if you testified against Tommy?

A. They would help me get out of the charge.

Q. Excuse me?

A. Help me get out of the charge that is pending on me.

Q. The Larceny charge?

A. No audible answer.

Q. You said that you went to Dice's Inn at about eight o'clock?

A. Uh, hum.

Q. Where were you before that?

A. I went to Boyd's to get my hair fixed, then before Boyd's, I went to Vames', sitting there talking to a friend of mine.

Q. What time did you go to Vames'?

A. Probably seven, seven-thirty.

Q. When?

A. Sometime around seven or something like that, right after they opened.

Q. And then you went to Boyd's after that?

A. Yeah I got my hair fixed because it

* * *

[580] Q. And then when you left Dice's that night, you left with Tommy Strickler and Henderson?

A. Yes.

Q. Had you ever met Mr. Strickler before?

A. One time at White's when I was about sixteen but he didn't say very much to me. I had an outfit on he liked.

Q. You lost me in the last part of that.

A. Up at White's. A bunch of them together. I had on an outfit, a leather outfit.

Q. That was a lot earlier?

A. Yeah when I was about sixteen.

Q. Uh, hum. And you are twenty-six now?

A. No audible answer.

Q. Did you say yes?

A. Yes.

Q. So this is the first time that you had met him for a long time?

A. Yes.

A. And so, you left and you all went to, so that Henderson could find out about some [581] pot?

A. Yes.

Q. And you ended up leaving Henderson at one of, one of the places where . . .

A. Apartment complex.

Q. Uh, hum. Where we went there to check on some pot?

A. Yes.

Q. So you all left him there and you all went to the motel?

A. Tommy was mad at him, the way he acted earlier that day.

Q. I'm sorry, I didn't understand.

A. Tommy was mad at him because the way, because he scared me and I started crying because he about hit a truck, head-on collision.

Q. So that is why you decided to leave him there?

A. Uh, hum.

Q. And you say that they were talking back and forth, Tommy was in the back seat with you and they were talking back and forth . . .

A. Yes.

Q. While you were sitting there?

A. Yes.

Q. Do you remember talking to Mr. Ashby [582] and telling him that Tommy never said anything to you about, anything about another girl or about anything happening to another girl?

A. I don't remember.

Q. You don't remember talking to Mr. Ashby?

A. Not completely.

Q. Pardon me?

A. Not completely.

Q. (Inaudible).

A. (Inaudible) and you forget it.

Q. Well first off, do you remember talking to Mr. Ashby?

A. Yeah I talked to somebody.

Q. Out at, out at Crawford Manor?

A. Crawford Manor? That's where I am living at.

Q. O.K. Well did he come out there and talk to you?

A. Yes.

Q. And do you remember telling him that the only statements that you ever heard Tommy Strickler make were things that he said in his sleep?

A. Yes.

Q. That's what you told him?

[583] A. Well I could hear that, him and Rebel was talking but I couldn't hear to [sic] plainly, because they were whispering.

Q. You couldn't hear because they were whispering?

A. They were joking and . . .

Q. You couldn't hear because they were whispering?

A. Yeah because they were making jokes and stuff between them.

Q. But you say Tommy was sitting in the back seat with you?

A. Yes. He was leaned up talking to Rebel.

Q. He was leaning forward. So you couldn't hear to [sic] plainly what they were saying?

A. No.

Q. And when you got, when you came back from Virginia Beach, you got stuck in the mud over at Nelson County?

A. Yes.

Q. Did you all stop at some friends of Tommy's?

A. Yeah we stopped at Lilly's.

Q. At Lilly's. Were those some people that Tommy had previously lived with?

[584] A. Uh, hum.

Q. That's where the car got stuck in the mud?

A. Yes.

MR. BOBBITT: No other questions.

REDIRECT EXAMINATION

BY MR. ERVIN:

Q. Donna Kay all the times that you talked to him, did he ever tell you that "it" was a girl that he had done that night?

A. No he didn't.

Q. He just referred to "it" as "it", or a nigger, is that what he said?

A. Yeah.

Q. And you say he told you he kicked "it" in the head. Did he tell you how he knew to kick "it" in the head?

A. He said he knew karate.

Q. He said he knew karate. And did he tell you why he kicked "it" in the head?

A. He said because "it" would give him no more trouble.

MR. ERVIN: Judge I would offer these two pictures that she identified as Exhibits, [.]

* * *

[589] MR. ERVIN: Call Dr. David Oxley.

DIRECT EXAMINATION

BY MR. MOORE:

Q. Will you tell us your full name?

A. I am Dr. David W. Oxley.

Q. And Dr. Oxley what is your professional field and your present position?

A. I am a Forensic Pathologist and I am Deputy Chief Medical Examiner for Western Virginia.

* * *

[601] Q. All right, O.K., go ahead.

A. There were abrasions, that is scrapes, underneath the chin. There was also some post-mortem slippage of the skin, that whitish area of skin that you showed, that you saw in the photograph that was post-mortem.

Q. You say slippage of the skin?

A. I'm sorry.

Q. You say slippage of the skin?

A. (Inaudible) of the skin, that whitish area that you saw in the Polaroid. But there was also an abrasion beneath the chin, that is a scrape, of the skin that either, that occurred probably during life or very close to the time of death.

Q. O.K.

A. Moving down to the body, on the upper body, the chest, breast, arms, there were long linear scratches over the upper part of the body, over the underside of the arms, on the sides of the arms near the shoulder and on the forearms.

Q. Have you seen such linear scratches?

A. Yes these are patterns, what are called pattern abrasions. Now the body at one point was dragged by the feet on its face, while [602] the body was on its face. These are drag marks. There were three small abrasions on the upper back that were superficial. There was a small abrasion on the right upper thigh and there were bruises of the upper thigh, upper inner thighs, just at the

anal area, crotch area. These were the external wounds present on the body.

MR. MOORE: All right. And at that point then, what did you do in terms of the autopsy?

A. These wounds were diagramed [sic], body diagrams were made and the wounds were photographed, following which the body was opened, organs and organ systems examined.

Q. All right. And did you notice anything remarkable that was not originally apparent from observation?

A. I beg your pardon?

Q. Did you notice anything remarkable from the autopsy that was not originally apparent from your observation?

A. The internal organs were normal. In the heart, in the fat around the heart, there were ice crystals indicating that the body at one time had been frozen. The stomach contained a large quantity of relatively undigested material.

[603] Q. Did you recognize any of that?

A. Oh yes, it was typical fast food. French fries and ground meat, fragments of pickle and fragments of yellow material that resembled cheese.

MR. MOORE: All right.

A. The internal genitalia, that is the uterus, cervix, tubes and ovary were normal. There was no evidence of intrauterine pregnancy. When the skull was opened, the skull fractures that I described previously were again

noted. There were indriven fragments of bone in the brain substance and many large lacerations of the brain itself with hemorrhage into the brain tissues. There were no other fractures, no long bone fractures or other bone injuries.

Q. Did you from your initial observation or the autopsy determine the cause of death?

A. Yes sir.

Q. And what was that?

A. Death was due to multiple blunt force injuries to the head with depressed skull fractures and lacerations of the brain.

Q. Now if you could, in lay terms, when somebody's death is caused by fractured skull and [604] lacerations to the brain, what actually causes them to die? What happens?

A. Well it depends on how severe the brain injury is. A immediate reaction of the brain to injury is swelling. And in people who survive for a period of time, it is this swelling of the brain that usually causes death. In a situation such as this where there are depressed fractures, multiple lacerations and extensive disruption of the brain tissue itself is caused by the injury, insult to the brain tissue.

Q. I am going to ask you to look at this rock.

A. You are not going to hand it to me, are you?

Q. No. I am not going to hand it to you. O.K. (Inaudible) Commonwealth Exhibit Thirteen, from the

injuries you saw to the head, you described a blunt force injury, could they have been caused by an object such as that?

A. Yes they could.

Q. All right. By either dropping it or forcibly throwing it?

A. Yes sir.

Q. If an object like that was the cause of the skull fracture which resulted in death, [605] would that be instantaneously?

A. With these fractures, death is rarely instantaneous. With these fractures, unconsciousness would be virtually instantaneous. Death might take a little bit longer, the heart might beat for a little while, respiration might go on for a little while. Not long, these are severe nonsurvivable brain injuries. But the center for respiration and for the heart that control cardiac action are in the brain stem, lower down on the brain stem. For unconscious, virtually immediately, death, very quickly.

Q. Matter of minutes?

A. Yes sir.

Q. Now is it also part of your training and duties in looking at a body that has been wounded or that has died from the wounds, to determine not only what caused death but how many assaults or woundings would be required, at a minimum, to cause the injuries that you see?

A. That caused the wounds here?

Q. Yes.

A. Three at a minimum. Perhaps more.

Q. But that's part of your job also to try to determine that?

A. To try to separate the injuries and [606] the number of, in blunt force injuries, number of blows or impact.

Q. All right. So in other, just for the jury's benefit, if you had a person who had died with gunshot wounds and you saw various wounds or holes in the body, in the head or arms or legs, you would try to determine how many bullets at a minimum caused those injuries?

A. Yes sir.

Q. And in this particular case, do you also try to determine not only how many blows or wounds caused the injuries but which ones caused death as opposed to certain other wounds that may not have caused death?

A. Where possible, yes.

Q. In this particular case, can you tell us anything about the four skull fractures in three different locations, whether any or all of those would have been lethal or fatal in and of themselves?

A. Any of those wounds, in and of themselves, exclusive of the others could have been potentially lethal.

Q. Can you give an opinion from your experience of whether any two of them together would have caused death?

[607] A. In my opinion, any two of them would have, yeah. They are all depressed and they all caused severe lacerations to the brain.

Q. I take that you cannot give an opinion as to in what order the wounds were inflicted?

A. No sir I can't.

Q. No basis in medical evidence in this case (inaudible)? With regard to the time of death, can you, could you draw any conclusions from the matter found in Ms. Whitlock's stomach?

A. From her stomach content, death occurred at an absolute maximum, six hours after she ate last and probably much less than that.

Q. All right.

A. The food in her stomach was very early, in a very early stages of digestion, the material was easily recognizable.

Q. Could it have been as short as an hour or two?

A. It could have been. It was a lot of it, very little of it had passed into the small bowel.

* * *

[611] Q. . . . Did you notice any injury or damage to the vaginal area?

A. No sir.

Q. From your experience as a forensic pathologist, does the absence of injury in the vaginal area determine or conclude that there was no sexual intercourse?

A. In an adult sexually active woman, no it doesn't. The absence does not necessarily mean that sexual intercourse did not occur.

Q. All right. And you mentioned an abrasion along one side of the neck, I believe, or both sides?

A. Yes sir, under the chin.

Q. All right. O.K., did anything that you saw under there, could that have been caused by a kick possibly?

A. Could have been, it was nonspecific and there was no injury to the underlying structures of the neck to indicate the nature of this, of this abrasion.

* * *

[614] MR. MOORE: I don't have any further questions. Mr. Bobbitt or Mr. Roberts may have some questions.

CROSS EXAMINATION

BY MR. BOBBITT:

Q. Dr. Oxley you mentioned the abrasions under the chin, would they have been consistent with choking?

A. Probably not with the hands, no because they would not, they were not fingernail marks the type you see with manual strangulation. Choking with a rope, with some foreign object [615] could be, yes.

Q. I believe you classified them as nonspecific?

A. Sir.

Q. You classified them, I believe, as nonspecific?

A. Yes sir.

MR. BOBBITT: I don't have any other questions.

MR. MOORE: Nothing further.

* * *

[654] DIRECT EXAMINATION

BY MR. ERVIN:

Q. Carter would you state your full name please?

A. Carter R. Ritchie.

Q. And your occupation?

A. Detective with the Rockingham County Sheriff's Department.

Q. And did you also get involved in this investigation?

A. Yes sir I did.

Q. Direct your attention back to, I believe January 11, 1990, did you have a, the opportunity to respond to a, the location of a certain vehicle?

A. Yes I did.

Q. And where was that at?

A. At the Rockingham County Garage located in Pleasant Valley.

* * *

[657] Q. All the fingerprints that, latent fingerprints that you recovered, you turned those over to Detective McDorman?

A. Yes sir, they were turned over, (inaudible) evidence from the vehicle was turned over to him at approximately ten-thirty that evening.

Q. Investigator Ritchie do you recognize this jacket?

A. Yes I do.

Q. And where have you seen this jacket before?

A. This jacket was removed from the crawl or hatchback portion of the vehicle which Detective McDorman and I processed at the county garage.

Q. And this came from this blue vehicle shown in the picture?

A. Yes it did.

Q. Was there any identification papers in this jacket?

A. Yes there was.

Q. And whose identification papers were they?

A. They were identification papers which belong to Mr. Henderson.

[658] Q. And what did you do with this jacket after it was located?

A. The jacket was picked up and placed into a bag by Detective McDorman and I assisted him in putting it in the bag.

MR. ERVIN: Judge we would offer this as the next Commonwealth's Exhibit?

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: Gentlemen the jacket will be marked Commonwealth's Exhibit Thirty and will be admitted into evidence. Mr. Ervin?

MR. ERVIN: Yes sir.

JUDGE: (Inaudible) down there please.

MR. ERVIN: Yes sir. Also Detective Ritchie at some point have you obtained the fingerprints of Mr. Ronald Henderson before?

A. Yes I did.

Q. And were those provided to the Harrisonburg Police Department to be sent to the state laboratory?

A. Yes sir they were.

MR. ERVIN: Answer Mr. Bobbitt's questions please.

MR. BOBBITT: No questions.

JUDGE: Thank you Mr. Ritchie.

[659] MR. ERVIN: Thank you, appreciate it. Call Detective Farley, Farley.

* * *

CLERK: Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

DETECTIVE FARLEY: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Please state your full name please.

A. Donald William Farley.

Q. And your occupation?

A. I am with the Harrisonburg Police Department.

Q. And are you one of the investigators in this case?

A. I am.

Q. Officer Farley, direct your attention back to I believe it is January 12, 1990, did you have the opportunity to go to the [660] home of Mr. Strickler's mother?

A. Yes I did.

JUDGE: What day was that?

MR. ERVIN: January 12, 1990.

JUDGE: All right.

MR. ERVIN: And where is this located?

A. This is in Shenandoah County.

Q. And who all was present when you went out there?

A. There was Captain Fairweather with the Harrisonburg Police Department and also Detective Claytor,

Hoover, McDorman and myself. There were two deputies from the Shenandoah County Sheriff's Department which were Deputy Koontz and Deputy Anderson.

Q. And for what purpose did you all go out there?

A. We had obtained a search warrant for the property of Mr. Ed Silvius.

Q. Let me show you this pair of blue jeans and ask you if you recognize these?

A. Yes I obtained these from Mr. Strickler's bedroom.

* * *

[667] MR. ERVIN: Call Detective McDorman.

CLERK: Raise your right hand please. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

DETECTIVE MCDORMAN: I do.

CLERK: Please take the stand sir.

DETECTIVE MCDORMAN: Thank you.

DIRECT EXAMINATION

BY MR. ERVIN:

Q. Al would you state your full name please?

A. Edmond A. McDorman.

Q. And your occupation?

A. Detective for the Harrisonburg City

* * *

* * *

[676] Q. How did you know to look in this vehicle?

A. This came from some information provided from a Donna Tudor. She indicated that Tommy Strickler . . .

MR. BOBBITT: Your Honor I am going to object to what she told him.

JUDGE: All right.

MR. ERVIN: That's fine. As a result of what she told you, you went to this vehicle though?

A. That is correct.

Q. Now let me also show you Commonwealth Exhibit Number Thirty-one. A pair of jeans, do you recognize these jeans?

A. Yes sir. These are a pair of jeans that were turned over to me by Captain Fairweather the morning of the search on the Silvius property.

Q. Now there is two pair of jeans, is this a pair from Detective Farley or Captain Fairweather?

[677] A. To my recollection those are the ones from Captain Fairweather.

Q. O.K. Let me show you this pair of dirty jeans and ask you if you recognize these?

A. These are the ones that were hanging in a tree that were located near the vehicle search. Those there are a pair that, I believe they came from the property that had (inaudible).

Q. So these were found hanging in a tree?

A. In a tree near the vehicle.

Q. And these were obtained from the property itself.

A. From the household.

Q. O.K. Who took possession of these?

A. I took possession of these particular jeans from Captain Fairweather and put them with the rest of the evidence in the locked room.

MR. ERVIN: Judge we would offer these as evidence in this case.

JUDGE: Any objections?

MR. BOBBITT: No objections.

JUDGE: All right these jeans will be marked Commonwealth's Exhibit Number Thirty-five and will be admitted into evidence.

* * *

[691] MR. MOORE: Call Dianna Willeman.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. WILLEMEN: I do.

CLERK: Please take the witness stand.

DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

A. Dianna Wren Willeman.

Q. And what is your professional field?

A. Currently I am employed as a Research Technologist at the Northwestern University in Chicago. Prior to that I was a Forensic Scientist working in the area of serology at the Bureau of Forensic Science in Roanoke, Virginia.

Q. All right. And how long were you working at the lab in Roanoke?

A. Approximately one year.

Q. And you were working there up until very recently?

A. Yes, until about the first of April.

* * *

[697] A. No they are not. They are found, the enzymes are found in the red blood cells in which everybody has red cells.

Q. Now were you asked to do any analysis in this Strickler case?

A. Yes I was.

Q. And were you given samples, known samples of blood from Mr. Strickler, the defendant and Ms. Whitlock, the deceased girl, and the boyfriend, John Dean?

A. Yes I was. I was given blood samples from all three of them.

Q. And now before you looked at the other items that were submitted, was there anything that you noticed about their three blood types?

A. Yes, from my first analysis on the blood to determine what their A B O type was, I determined that all three were A B O type O.

Q. So all of them had type O blood?

A. That's correct.

Q. O.K. And with regard to the enzyme values that you looked at on the three of them, was there anything unusual that you found? In Comparing Mr. Dean's and Mr. Strickler?

[698] A. O.K., yes. I did find that the blood samples on at least four of the enzyme types that I tested on them, they were exactly the same type.

Q. Does that have anything to do with your analysis on the other things submitted to you?

A. No it doesn't. Everything, you know, (inaudible), everything is, you know, what I receive and what my report says is what I got (inaudible).

Q. O.K. I just ask you that because that does appear on your report, is that right?

A. What?

Q. The fact that they were the same?

A. Yes it does.

Q. It doesn't (inaudible) on your conclusion (inaudible)?

A. No.

Q. O.K. Now were there several items seized from the scene or related to this case that you were asked to look at to determine whether, what the substances were?

A. Yes.

* * *

[705] Q. Now did you analyze some jeans that were submitted to you?

A. Yes I did.

Q. I hand you what is marked Exhibit Thirty-five, do you recognize these or anything on this?

A. Uh, hum, yes, the outside says that this is the item that I examined and also if we look on the inside, in the pocket, it will have the case number, the item number and my initials saying that I examined this piece of evidence.

Q. O.K. And these holes that are put in here, who put those there?

A. O.K. These right here, I put all these holes in here, I cut out samples to perform my analysis. Each one where I cut a hole has my initials by it saying that I removed the sample from the jeans.

Q. O.K. And did you draw any conclusions as to these jeans?

A. O.K. Yes I did. I found that, first of all, I tested four stains. I found that four of those stains were human

blood. I also tried to carry that a little further and determine [706] some of the blood types. And what I found is that one of the stains, I determined that it was a type O blood and also that in another blood type called PM was type C. There was also another stain, second stain that I examined, that I could say that my results indicated that that human blood on there was type O.

Q. All right. So that could have been blood from Leanne Whitlock?

A. That's correct.

Q. Did you also examine a black tank top shirt?

A. Yes I did.

Q. Do you recognize anything on this?

A. It's hard to see. But this is the shirt I examined and up in the top here, I have written the case number, the item number and also my initials with a red marker up there.

Q. Does this also have some holes in it?

A. Yes it does. You can see some areas on the back that I removed holes from, they are also circled.

Q. And this is Commonwealth Exhibit Seven, is that marked Commonwealth Exhibit Seven?

A. Yes it is.

* * *

[716] Q. I believe I failed to ask you about one other item, actually two other items you looked at, there was a green jacket?

A. Yes.

Q. Do you remember doing an analysis on that item?

A. Yes I do.

Q. That is included in your report.

A. Yes it is.

Q. I ask you, do you notice anything on that bag?

A. Yes, my initials and the case number on the back.

Q. This green army jacket, you also analyzed. Can you tell us, I'll have to take it out. It's Exhibit Thirty. Can you tell us whether there was anything on the jacket itself that shows to you?

A. Yes, I think it's right, if you can see right over here, again the case number and my [717] initials saying that I examined this item.

Q. O.K., and did you find anything on that jacket?

A. Yes I did. I need to refer to my notes. It takes me a while to sort through these. There were, on the green jacket, there were several different places, six different places where I found a stain that was positive for blood.

Q. Is that human blood?

A. Yes and that was human blood in four of the areas that I have indicated that there was blood. I determined that four of the stains were human blood.

Q. O.K. Now was there a second pair of jeans that you looked at?

A. Yes there was.

Q. Do you recognize these and anything on them?

A. O.K., this, the container has my initials and also the jeans should have my initials in here, case number and my initials.

Q. Did you find anything on those?

A. No I did not.

Q. O.K. If a pair of jeans or some cloth that has some type of stain on it or blood on it, was washed three or four times, would you [718] expect to be able to find anything to analyze?

A. I would not expect to. Occasionally you might be able to perform a test that would indicate that blood might be there but in most cases you cannot determine whether the blood was human or animal.

Q. Would that be true if it was washed once or twice?

A. Yes, that's true.

Q. Now, as you were doing your analysis for these stains, did you come across some hairs and the, on the impressions and the shirt and bra that was given to you?

A. Yes I did.

Q. And what did you do with those?

A. They . . .

Q. Did you forward them on to somebody else in the lab for further analysis?

A. Yes I did. I removed them from the items, put them in a sealed envelope and transferred them to the hair examiner.

* * *

[721] DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

A. Michael R. Grim.

Q. And what is your professional field?

A. I am employed as a Latent Print Examiner and Impression Evidence Examiner for the Commonwealth of Virginia.

Q. When you say impression evidence, what are you talking about?

A. Primarily I am referring to shoe impressions, tire impressions and fabric impressions.

Q. Basically all types of prints. You look at for comparisons?

A. Yes sir.

* * *

[729] Q. Is there a term for those points where you compare one to the other and see the same thing?

A. Individual Identifying Characteristics basically is what they are referred to.

Q. And how many different points or characteristics do you like to match, what do you like to see before you

make a conclusion as to the identity of the two individuals?

A. There is no set number that is required in effecting identification, other than the State of Virginia or in the F.B.I. I personally have effected identifications on as few as seven characteristics and have testified to as few as eight characteristics. But that's not to say that I wouldn't testify to seven or that someday I may identify a print on as few as six but I feel very comfortable with seven characteristics personally.

Q. And in this particular case, did you make any identifications with any of the latents submitted to you, the lifts, with the known prints of either Strickler or Tudor or Wood or [730] Henderson?

A. Yes I did. I was able to identify eighteen latent fingerprints and one latent palm print with the fingerprints of Tommy David Strickler. I identified nine fingerprints with the fingerprints of Donna Kay Tudor Maddox and I identified one latent palm print as a palm print of Mark Wood.

Q. Were you able to make any matches from the car with Mr. Henderson?

A. No, I was not.

Q. Out of all the fifty-seven lifts and a piece of paper that you were submitted, how many latents were you actually able to use, of value, to work from?

A. There were a total of twenty-nine latent fingerprints, three latent palm prints and there was one latent impression which is either a portion of a fingerprint or a

portion of a palm print. I was not able to determine which portion of the hand that it would have come from.

MR. MOORE: O.K.

A. It could have also quite possibly come from a portion of the sole of the foot. It was strictly just friction ridges, a very small number of them but there was a sufficient number [731] to identify.

Q. So of the twenty-nine latent prints that you could work with, these lifts, are you saying eighteen of them came from Mr. Strickler?

A. Twenty-nine of the latent finger-prints, yeah, there were, out of the twenty-nine latent fingerprints, eighteen of them I was able to identify as fingerprints of Tommy David Strickler.

Q. And two from, I mean nine from Ms. Tudor?

A. That is correct.

Q. And then there were two, were the other two identifiable?

A. The other two fingerprints of value are identifiable but I was not able to identify them with the fingerprints of Strickler, Henderson, Maddox or Wood.

Q. O.K., so you could read them but you didn't have a match in those four people?

A. That's correct.

Q. You weren't given exclusion prints for Ms. Whitlock or Mr. Dean were you?

A. That's correct, I did not.

Q. O.K. Of the three palm prints that you could work with, one of those was Mr. [732] Strickler's, one of those was Mr. Woods and what was the third one, is that . . .

A. The other one remains, the third latent palm print remains unidentified, however, I did not have inked palm prints of Donna Maddox or Ronald Henderson as well as palm prints of any of the other individuals who had access to the items.

Q. O.K. Based on your twenty-one years plus of experience, how certain are you as to your conclusions of the eighteen fingerprints from Mr. Strickler?

A. I am one hundred percent sure.

Q. And you said you like to have, you are comfortable with seven to eight points of agreement. How many did you have on some of his prints?

A. Some of the latent prints has as few as twelve to fifteen characteristics where others were in excess of fifty characteristics in the latent prints.

Q. In excess of fifty points of agreement between the ones found in the car and the ones you looked at?

A. That is correct.

* * *

[736] Q. And you were given three lifts from the law enforcement officers?

A. Yes, they were part of the items that were submitted.

Q. Do you recognize these shoes here that are marked Commonwealth's Exhibit Thirty-two, is there anything on the shoes or the bag that you recognize?

A. Yes. I identify, I can identify these shoes as being the shoes submitted in connection with this case, both shoes, there are laboratory case numbers as well as the item under and my initials.

Q. O.K. And were you able to make any identifications between those shoes and any of the three lifts that you were given?

A. I was on the lift items, well it was item 40-10, 40-29 and 40-30 were three lifts that were submitted from the item 40 package of lifts. Out of those three lifts I was able to identify two of the lifts or two of the shoe impressions on lift 40-29 and 40-30 as being made by the item [737] 27B, right shoe that was submitted.

Q. And with regard to the third one, did you make any conclusions at all?

A. It corresponded to the item 27A, left shoe with respect to design elements but as far as making a further determination, I was unable to, due to the indistinct nature and the fragmentary nature of the impression.

Q. So it is consistent with this shoe but you couldn't say for certain as the other two?

A. That is correct. It is the same sole design but there was just not enough there to positively identify.

Q. And you prepared a Certificate of Analysis also in this matter?

A. I did.

MR. MOORE: Your Honor I would like to have this Certificate marked, dated March 26th, Commonwealth's Exhibit Thirty-nine.

JUDGE: Any objection?

MR. BOBBITT: No objection.

JUDGE: All right gentlemen, I'm going to mark this Thirty-nine and it will be admitted into evidence.

* * *

[741] MR. MOORE: Call Myron Scholberg.

JUDGE: Myron Scholberg.

CLERK: Please raise your right hand. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. SCHOLBERG: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. MOORE:

Q. What is your full name?

[742] A. My name is Myron T. Scholberg, Scholberg is spelled S C H O L B E R G.

Q. And what is your professional field?

A. I am a forensic expert. My area of expertise is the examination of hairs, fibers, fabrics and related materials.

Q. And is that with the Bureau of Forensic Science of the Commonwealth of Virginia?

A. That is correct.

Q. How long have you been with the Bureau doing hair and fiber work?

A. With the State of Virginia since 1985.

Q. And who were you with before 1985?

A. I was with the Federal Bureau of Investigation until I retired in 1985.

Q. And your present position is a full time position?

A. Yes it is.

Q. And how long were you with the F.B.I.?

A. Twenty-one years.

* * *

[751] Q. But in terms of a hair falling out or being pulled out or being cut, what differences would you see in the root hair?

A. There would be a lot of difference in the root shape of a root that had fallen out naturally and a root that has been forcibly removed. A root that has fallen out naturally would be round and (inaudible) such as you see in the diagram. A root that has been forcibly removed will be shrivelled and distorted and you can look at it and just about feel ouch when you see it. It will be a lot different than a root that is (inaudible) which indicates that it could have been, fallen out naturally.

Q. And what is the difference in your terminology between a hair and a hair fragment?

A. I usually indicate a hair fragment to be a hair that does not have a root.

Q. O.K. Now can you from your microscopic analysis, conclude that a hair definitely came from one particular person?

A. No. Hair identification is not a positive means of identification. By that I mean [752] I cannot definitely say that a hair originates from a certain individual to the exclusion of all other people in his or her race group and the strongest or the most positive identification would be that the hairs are microscopically alike in all identifiable characteristics and could have come from that individual. They either originated from that individual or another individual whose hair characteristics are microscopically the same.

Q. So if you said they were microscopically alike in all identifiable characteristics, there is no higher degree of identification (inaudible)?

A. That would be correct.

Q. And if you were given a pool of two or three known samples and were given a hair that you knew came from one or the other, could you then identify with one of those three?

A. Hopefully yes. Maybe a few times during the year I will have a case that I will have known hairs that are so nearly alike that I can't tell the difference but very seldom does this happen.

* * *

[754] Q. And did you undertake to compare the sample hair to be analyzed with the two known samples that you had?

A. Yes I did.

Q. Did you draw any conclusions with regard to the hair in the impressions? That would be items A1 and C1.

A. Yes I did.

Q. And what were your conclusions?

A. The two items that were identified, A1 and C1, hairs from the impressions, I mounted on glass microscope slides in order that I might compare them with known hair samples that I had received. Item A1 contained eleven head hair fragments. These fragments were all of Negroid origin. Item C1, also identified as hairs from the impressions, contained approximately seventy head hair fragments, all of Negroid origin. When I compared them with the hairs identified to me as coming from Leanne Whitlock, I found that they were microscopically alike in all identifiable characteristics and my conclusion was that they could have originated from this individual.

[755] Q. And that level of conclusion, that they were microscopically alike in all identifiable characteristics and could have originated, do you ever give any identification more certain than that?

A. No.

Q. And did you examine any hairs identified as having come from the shirt and bra that has previously come into evidence?

A. Yes I did.

Q. And what did you (inaudible) that?

A. This is identified as my item 2, hairs that were removed from a shirt and a bra. Among the hairs removed from the shirt and bra, I found a Caucasian head hair fragment and two Caucasian head hairs that when compared with the Caucasian hairs identified to me as coming from Tommy Strickler, were microscopically alike in all identifiable characteristics. My conclusion again was that they could have originated from this individual. Two of the, the two Caucasian hairs that had roots, also had roots which were distorted and shrivelled and had been forcibly removed from the skin surface. In addition to these hairs then, I found another brown head hair of Caucasian origin. When I compared it with the [756] hairs coming, identified to me as coming from Tommy Strickler, I found that it was microscopically dissimilar. Based on the known hair sample that I had to compare, it would be my conclusion that it did not originate from this individual.

Q. And the two, you said from the shirt and the bra that appeared to be microscopically alike to the defendants, there were two head hairs and one fragment?

A. That's correct.

Q. I take it the fragment was one where the root was not intact?

A. No root.

Q. O.K., but the one you said that the roots were distorted and shrivelled, it appeared that those two were forcibly removed?

A. That's correct.

Q. All right, and you examined a third, a hair that came from a third item, from the cap?

A. Yes.

Q. Did you find any hairs in that that you could make any conclusions about?

A. This was my item one, identified as hairs removed from a cap. I, in this particular item there were twenty head hairs and head hair [757] fragments. When I compared them, and they were of Caucasian origin, when I compared them with the hairs identified as coming from Tommy Strickler, I found that they were microscopically dissimilar and again based on the known sample that I received, it would be my conclusion that they could not have originated from this individual.

Q. O.K. Of all the hairs or fragments found in that cap, you found not related to Mr. Strickler?

A. That's correct.

Q. That was microscopically similar?

A. That's correct.

Q. And the one hair with the shirt and the bra that were not like Mr. Strickler's, do your notes indicate anything about the color of that or whether anything says that was not the same type as the one in the hat?

A. I don't have anything to indicate the color. I have it as a Caucasian head hair, microscopically different from those identified as coming from Mr. Strickler.

Q. All right. I want to ask you one other thing. You mentioned about the hairs in the impression, the Negroid hair that matched up with Ms. Whitlock's. You said something about it being [758] torn or cut. What led you to that conclusion?

A. Well the microscopic examination would reveal ends that would be torn or cut and these were fragments so there were no roots there but the hairs had jagged ends and gave that appearance.

Q. And did you prepare a Certificate of Analysis setting out your findings in this?

A. I did.

MR. MOORE: I would like this Certificate dated May 8th marked Commonwealth's Exhibit Forty-one.

JUDGE: Any objections?

MR. BOBBITT: Two pages?

JUDGE: Yes sir.

MR. BOBBITT: No objections.

* * *

[767] MR. BOBBITT: Your Honor we would like to call Kenneth Workman. Mr. Workman would you walk over to the Clerk's desk and be sworn?

CLERK: Raise your right hand please. Do you swear or affirm all the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. WORKMAN: No audible answer.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Mr. Workman would you state your name please?

[768] A. Kenneth Lee Workman.

Q. Can you speak up a little bit?

A. Kenneth Lee Workman.

Q. Where do you live Mr. Workman?

A. Rockingham County.

Q. Rockingham County. Where did you live in January of this year?

A. Timberville. Plains Apartments.

Q. Did you know Ronald Henderson?

A. Yes sir.

Q. How did you know him?

A. I met him through another friend.

Q. Did he come to your house early in the morning of January 6th?

A. Yes.

Q. What happened when he came there?

A. He came in there and had blood and stuff on his pants, talking about he killed a nigger.

Q. Did he say that to you?

A. Yes sir.

Q. Do you know how he got there?

A. He said some guy brought him there named Stoney and when he went to leave, the guy was gone so he came back in.

Q. Came back into your house?

[769] A. Yeah.

Q. Did he end up spending the night there at your house?

A. No, he set there for a couple of hours.

Q. A couple hours?

A. Yeah.

Q. What time was it when he got there?

A. When he got there?

Q. Uh, hum.

A. I'd say about four-thirty, five in the morning.

Q. Are you sure it was blood on his pants?

A. Yeah because he, you know, would keep talking about it.

MR. BOBBITT: I don't have any other questions.

CROSS EXAMINATION

BY MR. ERVIN:

Q. Mr. Henderson had been drinking when he came to your house, hadn't he?

A. Yes sir.

Q. He was pretty well drunk at the [770] time?

A. Yeah. That's why I didn't believe him.

Q. And he told you that his friend Stoney was outside?

A. Yeah.

Q. And then later on he left your house and came back a few minutes later, right?

A. Yeah because he was cussing because the guy took off and left him.

Q. Stoney took off in the car and left him there, right?

A. Yeah.

Q. And you never saw who all was in the car outside?

A. No I didn't even see the car pull up.

MR. ERVIN: I have no other questions Judge. Thank you.

MR. BOBBITT: No other questions. May he be excused Judge?

MR. ERVIN: That's fine Judge.

JUDGE: You are free to go Mr. Workman.

MR. BOBBITT: Lillian Meadows. Ms. Meadows - could you go over there and be sworn please?

[771] CLERK: Raise your right hand please. Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MS. MEADOWS: I do.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Ms. Meadows would you state your name please?

A. Lillian Sue Meadows.

Q. And are you related to Tommy Strickler?

A. Yes sir, it's my brother.

Q. Where do you live Ms. Meadows?

A. Quicksburg.

Q. What county is that in?

A. Shenandoah County.

Q. Did your brother come by your house sometime on Saturday, January 6th?

A. Yes sir.

Q. What time did he come by?

A. The first time he was there was somewhere around eight o'clock and we was still in [772] the bed and he just went on down the road, he never stopped, he blowed the horn and nobody got up so I mean, you know, he just went on. The second time he came back was approximately ten o'clock, somewhere around that area. That's when he did come in the house and talk to me.

Q. Was anybody with him?

A. Donna Kay was with him.

Q. Donna Tudor?

A. Uh, hum.

Q. Did your brother, did Tommy come in the house to talk to you?

A. Yes.

Q. Did you see what he was wearing?

A. Yes, he had on a pair of blue jeans.

Q. Was there any blood on the blue jeans?

A. No sir.

MR. BOBBITT: I don't have any other questions.

* * *

[780] DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Ms. Silvius would you state your name please?

A. Irene May Silvius.

Q. And are you Tommy Strickler's mother?

A. Yes sir.

Q. Where do you live Ms. Silvius?

A. I live in New Market, Virginia, right out of New Market on 620.

Q. And do you live there with your husband?

A. Yes sir.

Q. What's his name?

A. Raleigh Edward Silvius.

Q. They call him Ed?

A. Yes.

Q. Were you and your husband and your daughter there at your house on January 6th, Saturday morning?

[781] A. Yes sir.

Q. Did you see Ronald Henderson at that time?

A. Yes I did.

Q. How did that come about?

A. Well he came to our house and he came down the path and my daughter and my husband went out first

and then I followed behind them. And he was asking if Stoney was there and they were telling him no and he said you know who I am talking about don't you, I'm talking about Tommy and he is not here? And they said no he is not here and so he said well he, he's got my cousin's car from West Virginia and he said we have got to find him, said we've got to find him. And my husband said did you go to the law and he said, no we aren't going to the (F) law, he said, but he said that's all right, we'll find him tonight where he was last night, said he'll be at Dice's Inn and he said we will kill the (F) (SOB)?

Q. Did he go down to the car?

A. He asked to go out the road where we own some property to where he wanted to check and see if Tommy's clothes were still in the car and my daughter said well, she said we have part interest, I have part interest in that land and I [782] don't think it is any concern of yours about Tommy's clothes being out there.

Q. But did he eventually go on down there?

A. He kept working his way up the path towards the road to go out that way and he kept insisting that he go out and look and so finally Ed said well just let him go look, you know, so he went out the road, it's not very far and so he didn't come back for awhile and so I said to Ed, I said well just how long does it take him to just walk out there and see if the clothes are in the car and leave? And Ed said well I don't know if I ought to go on out so I suggested so am I. So we walked out to the place and when we got out there in sight, he, Henderson was laying on the hood of the car on his back and I couldn't exactly tell at that point what he was doing, you know. And so

then as we kept getting closer, he come off the hood of the car and until we got up there, he was putting on some shoes and socks. And I walked on up to him and as I got right at him, we went back to the car, the door was open and I said, I looked at him and I said wait a minute. I said you've got Tommy's blue jeans on and I said you cannot take his clothes like this and I said I bought [783] those clothes for him for Christmas and I said you get on the other side of that car and I'm going to turn my back, I won't turn around and look at you and my husband was standing there and I said you take those clothes off and put yours back on. So he was standing here at this open car door and he says O.K., so I turned my back and in just a little bit he slams the car door shut and out the road he goes running by me. And I said hey don't take those clothes and he just kept running. So I went to the car and I don't know what else he put in the car but I do know his dirty blue jeans were there and I caught ahold [sic] of them and give them a sling down the road and they sort of hung in an old locust limb or something there. And when the law came to our house, I told him where the blue jeans were and they got them.

Q. O.K. Now later, about a week after that, did you see your son Tommy?

A. Yes I did.

Q. And how did you happen to see him?

A. He called me and ask me to come to town and pick him up and I went in and . . .

Q. Who was with him then?

A. Donna Tudor.

Q. Did you pick the two of them up and [784] bring them back to your house?

A. Yes I did.

Q. Did you wash some clothes for Tommy at that time?

A. Yes sir.

Q. What did you wash?

A. Well, some things of hers and his blue jeans and shirts and just regular clothes.

Q. Did you notice whether the blue jeans had a hole in them?

A. Not at that time, I did not until after I took them out of the dryer, I noticed the hole in his blue jeans and I said what happened to your blue jeans Tommy. And she said he burned them with a cigarette.

Q. Did those, did those blue jeans have any stains on them, any blood stains?

A. No sir.

Q. O.K. And where those blue jeans at your house when the police came?

A. Yes sir. They were still folded in the bag that they were brought from the laundry in.

MR. BOBBITT: O.K. I don't have any other questions.

[785] CROSS EXAMINATION

BY MR. ERVIN:

Q. Did your son ask you to wash these for him?

A. Yes sir. He said could we wash our clothes and I said yes you can.

Q. And you say there were no stains on them. Did you take the pants and hold them up and look at them?

A. Well no sir I did not but I seen him get right in the car with me when I picked him up from town and he rode right in the front seat with me and . . .

Q. And were those the same pants he had on that you washed?

A. Yes sir. He went home and changed his pants and they were the ones that, that were washed.

Q. And this was on January 11th, right?

A. Yes.

Q. So from January 5th until January 11th, you don't know what he did with those pants whether he washed them or anything else, do you? Really, truthfully you don't really know?

A. Well no I don't. He, I only know he [786] had no other clothes, he had only what he had on.

Q. Your son went to Virginia Beach, didn't he?

A. That was to my knowledge, I have only hearsay.

Q. Did he come by your house before he left for the beach?

A. No sir.

Q. And this Mr. Henderson, did you know Mr. Henderson before that day?

A. He was at my house the day before with Tommy.

Q. He was with your son at your house on January the 5th, right?

A. Right.

Q. And how long did they stay at your house?

A. Well they came to Harrisonburg with me that day and I let them out in Harrisonburg.

Q. And where did you let them out at in Harrisonburg?

A. I'm not quite sure, I think it was the First Virginia Bank I went into and they got out of the car there.

Q. And when you let them out, they didn't have any vehicle or anything with them, did [787] they?

A. No sir.

Q. Tommy usually has a small hunting knife that he carries on his belt, doesn't he?

A. Yes sir.

Q. And he always has that with him?

A. Yes sir. It belonged to his father.

MR. ERVIN: I have no other questions Judge. Thank you Ms. Silvious.

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[797] MR. BOBBITT: We would like to call Jay Tudor.

CLERK: Would you raise your right hand please? Do you swear or affirm the evidence you give in this case will be the truth, the whole truth and nothing but the truth?

MR. TUDOR: No audible answer.

CLERK: Please take the stand.

DIRECT EXAMINATION

BY MR. BOBBITT:

Q. Mr. Tudor would you state your name please?

A. Jay (Inaudible) Tudor.

Q. How old are you?

A. Twenty-one.

Q. And are you married to Donna Tudor?

A. Yes sir.

Q. Where do your parents live?

[798] A. Augusta Springs.

Q. Did you see Donna Tudor sometime in March of this year?

A. Yes sir.

Q. Exactly when was it?

A. About the third week.

Q. In what month?

A. In March.

Q. And where did you see her?

A. At my dad's trailer.

Q. How did it come about that you saw her at that time?

A. She came out to visit.

Q. And did you at that time talk to her about this case?

A. Yes sir.

Q. Did she tell you whether she was present at the murder scene?

A. Yes sir.

Q. What did she say?

A. That she was.

Q. Did she tell you whether Mr. Strickler participated in the murder?

A. Yes sir.

Q. What did she say?

A. No he didn't.

[799] MR. BOBBITT: I don't have any other questions.

CROSS EXAMINATION

BY MR. ERVIN:

Q. What did she tell you rather than just answering yes and no questions, what did she tell you?

A. She was telling me that she was picked up by the girl.

Q. She was picked up by who? By the girl?

A. Yes sir.

Q. And where did she say that she was picked up at?

A. Blackburn Addition.

Q. O.K. So a girl picked her up at Blackburn Addition, where is that located? Is that here in Staunton?

A. Yes sir.

Q. O.K. So the girl picked her up at the Blackburn Addition, what else did she tell you?

A. They went to Harrisonburg and they rode around and went and purchased some reefer or [800] something. And they were, I can't remember if they were unable to get it or not and then time went on and they went to the corn field and . . .

Q. When did the two men get with them?

A. They were in the car with them.

Q. So when the girl picked Donna Tudor up in Blackburn Addition the two men were already with the girl?

A. No they (inaudible).

Q. Do what?

A. She told me they went by and picked them up.

Q. Who came by and picked them up? That she and the other girl?

A. Yeah.

Q. Went by and picked the two men up?

A. Yes sir.

Q. And where did she say they picked the two men up?

A. She, I don't recall.

Q. O.K., so she said that she and the other girl got together. The other girl came down and picked her up at Blackburn Addition, then they went and picked up two men, right?

A. Something like that.

Q. Well is that right?

[801] A. As much as I can recall.

Q. O.K., and then what did she say happened? That they rode around for a while?

A. Yes sir.

Q. And then they went to the corn field?

A. No it was a couple days.

Q. What?

A. It was a couple days later.

Q. A couple days later?

A. Yes sir.

Q. That they went to the corn field?

A. Yes sir.

Q. What happened then?

A. She told me her and the Strickler boy was in the car at the time. That the other boy and girl was outside the car and she tried to get away, escape and the other fellow jumped on her and started beating her and couldn't stop.

Q. And that he killed her?

A. Yes sir.

Q. And what did she tell you he beat her with?

A. His fist and I think she said a rock.

Q. His fist and a rock?

[802] A. His fist and I believe, a rock.

Q. This rock you are talking about, you talked to Sergeant Campbell yesterday, didn't you?

A. Yes sir.

Q. And he asked you how, what Donna Kay told you how the girl was killed, didn't he?

A. Yes sir.

Q. And you told him yesterday that Donna Kay told you that the man, Henderson used his fists to kill the girl?

A. That's right sir.

Q. You never mentioned the rock to him, did you?

A. No sir.

Q. First time you mentioned this rock was when you saw it in the Courtroom today, wasn't it?

A. No sir.

Q. When did you mention it before? You didn't tell Sergeant Campbell did you?

A. No sir.

Q. Why didn't you tell Sergeant Campbell?

A. (Inaudible).

Q. What?

A. I didn't remember it.

[803] Q. You didn't remember it. You remember it today but you didn't remember yesterday?

A. I tried to call him back yesterday evening. You can call his secretary and ask her, you will find out that I called yesterday evening at five forty-five.

Q. So you talked to him twice yesterday, didn't you?

A. Yes sir.

Q. And both times he asked you how was the girl killed, right?

A. Yes sir.

Q. And both times you said Donna Kay told you the man beat her with his fists, right?

A. Yes sir.

Q. And you never mentioned the rock to him, did you?

A. No (inaudible) first time.

Q. Have you ever been convicted of a felony before Mr. Tudor?

A. Yes sir.

Q. How many?

A. One.

Q. And what was that?

A. Breaking and entering.

[804] Q. Are Donna Kay Tudor and you all still married?

A. Yes sir.

Q. And she separated from you, didn't she?

A. I separated from her.

Q. You separated from her?

A. Yes sir.

Q. And she is living with another man now, right?

A. I don't know.

Q. You don't know at all?

A. No sir.

Q. You have no idea?

A. No sir.

MR. ERVIN: You told, never mind, I withdraw that question. I have no other questions Judge.

MR. BOBBITT: No other questions.

JUDGE: All right Mr. Tudor.

MR. BOBBITT: Your Honor we rest.

JUDGE: Mr. Ervin.

MR. ERVIN: We have no other witnesses Judge.

* * *

VIRGINIA: IN THE CIRCUIT COURT
OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

* * *

[806] JUDGE: All right Sheriff. Ladies and gentlemen of the jury, the following instructions which will now be given to you by the Court are [807] the laws of the Commonwealth of Virginia which applies to the evidence which has been introduced in this trial. You are to consider and read these instructions in their entirety, all of the instructions in their entirety, constitute the law in this case. And now when you retire to the juryroom to deliberate and reach a verdict, reach a unanimous verdict on each of the charges, you will consider all of the instructions which are now given to you. Members of the jury, I'm going to read them to you at this point and when you go to your juryroom, you will have the instructions, will have all of the exhibits with you. The defendant is presumed to be innocent. You should not assume that the defendant is guilty because he has been indicted and is on trial. This presumption of innocence remains with the defendant throughout the trial and is enough to require you to find the defendant not guilty unless and until the Commonwealth proves each and every element of the offense beyond a reasonable doubt. This does not require proof beyond all possible doubt. Nor is the Commonwealth required to disprove every conceivable circumstance of innocence. However suspicion or probability of guilt is not enough for a conviction. There is no [808] burden on the defendant to produce any evidence. A reasonable doubt is a doubt based on your sound judgment after a full and impartial consideration of all the

evidence in the case. The fact that the defendant has been indicted by a Grand Jury is not evidence against him and you should not consider it. You are the Judges of the facts, the credibility of the witnesses and the weight of the evidence. You may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified. Their interest in the outcome of the case, their bias and if any has been shown, their prior inconsistent statements or whether they knowingly testified untruthfully as to any material fact in the case. You may not arbitrarily discard believable testimony of any witness. However after you have considered all of the evidence in the case, then you may accept or discard all or part of the testimony of a witness as you think proper. You are entitled to use your common sense in judging any testimony. From these things and all the other circumstances of the case, you may determine which witnesses are more believable and weigh their testimony accordingly. [809] During the trial, evidence was introduced that a witness had previously made a statement that was inconsistent with his or her testimony at this trial. The only purpose for which that evidence was admitted was its bearing on the witness's credibility. It is not proof that what the witness may have said earlier is true. You may consider proof of a witness's prior conviction of a felony or of a crime involving moral turpitude as affecting his credibility but it does not render him incompetent to testify. The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that the defendant

killed Leanne Whitlock. And two, that the killing was willful, deliberate and premeditated and three, that the killing occurred during the commission of a robbery while the defendant was armed with a deadly weapon or occurred during the commission of abduction with intent to defile or to extort money or a pecuniary benefit or was of a person during the commission of or subsequent to rape. If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the [810] defendant guilty of capital murder. If you find that the commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty of capital murder. Willful, deliberate and premeditated means a specific intent to kill, adopted at sometime before the killing but need not exist for any particular length of time. A deadly weapon is any object or instrument that is likely to cause death or great bodily injury because of the manner and under the circumstance in which it is used. The Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that

caused the victim's death. [811] If you do not find from the evidence that the defendant is guilty of capital murder, then you may consider the crime of first degree murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that Leanne Whitlock was killed. Two, that the killing was malicious. Three, the killing occurred in the commission of a robbery, rape or abduction. Four, that the defendant was a participant in the commission of this robbery, rape or abduction and five, that the defendant or another participant in the commission of this robbery, rape or abduction killed Leanne Whitlock. If you find from the evidence that the Commonwealth has proven beyond a reasonable doubt each of the above elements of the offense as charged, then you can find the defendant guilty of first degree murder and fix his punishment at one, imprisonment for life or two, a specific term of imprisonment but not less than twenty years. If you find the Commonwealth has failed to prove any one or more of the elements of the offense beyond a reasonable doubt then you shall find the defendant not guilty of first degree murder. Malice is that state of mind which results in intentional doing of a wrongful act to another [812] without legal excuse or justification at a time when the mind of the actor is under control of reason. Malice may result of any unlawful or unjustifiable motive. Malice may be inferred from any deliberate, willful, cruel act against another however sudden. You may infer malice from the deliberate use of a deadly weapon unless from all the evidence you have a reasonable doubt as to whether malice-existed. You have been instructed on more than one grade of homicide and if you have a

reasonable doubt as to the (inaudible) of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of the lesser offense. For example, if you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. If you have a reasonable doubt as to whether he is guilty at all, you shall find him not guilty. Under the murder indictment against the defendant you may return any one of the following verdicts, which verdict must be unanimous. One, guilty of capital murder. Two, guilty of murder in the first degree. Three, not guilty. The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. [813] One, that the defendant intended to steal and two, that the motor vehicle and other personal property was taken and three, that the taking was from Leanne Whitlock or in her presence and four, that the taking was against the will of the owner or possessor and five, that the taking was accomplished by violence to the person or the threat of serious bodily harm. If you find from the evidence the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty of robbery and fix his punishment at confinement in the penitentiary for life or for a specific term but not less than five years. If you find the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty. The defendant is charged with the crime of abduction. Kidnapping and abduction are the same

crime. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime. One, that the defendant by force or intimidation did seize, take, transport, detain or hide Leanne Whitlock and two, that the defendant did so with the intent to obtain money or other benefit of value or with [814] the intent to defile Leanne Whitlock and three, the defendant acted without legal justification or excuse. If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the offense as charged, then you shall find the defendant guilty and fix his punishment at confinement in the penitentiary for life or for a specific term but not less than twenty years. If you find the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the offense, then you shall find the defendant not guilty. Extort means to compel someone to part with something of value. Pecuniary benefit means that everything that can be valued in money. To defile means to sexually molest. It is not necessary that each and every element of the offense be proved by direct evidence. For an element may also be proved by circumstantial evidence. You may convict the defendant on circumstantial evidence alone or on circumstantial evidence combined with other evidence, if you believe from all of the evidence that the defendant is guilty beyond a reasonable doubt. When the Commonwealth relies on circumstantial evidence, the circumstances must be consistent, [815] proved must be consistent with guilt and inconsistent with innocence. It is not sufficient that the circumstances proved create a suspicion of guilt however strong or even a probability of guilt. The evidence as a whole must

exclude every reasonable theory of innocence. If you find the defendant guilty you should impose such punishment as you feel is just under the evidence and within the instructions of the Court. You are not to concern yourselves with what may happen afterwards. Members of the jury, that, those are the instructions in this case. We will now proceed with the closing statements of the attorneys.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF
THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

[815] MR. ERVIN: May it please the Court. Ladies and gentlemen first of all let me do thank you for being so patient. This has been a long drawn out procedure, it is a very important procedure. It is important to both Mr. Strickler, the family of Leanne Whitlock, to every person here in Augusta County so I do thank you for bearing with us these last four days. In my opening statement I told you what the Commonwealth was going to prove. Now I submit to you that we have proved each and everyone of these things that I told you about. Look at the evidence in this case. There are several things which really [816] cannot be disputed beyond any doubt, beyond any question at all. First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfas said that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then he and another man and another girl all drove off with Ms. Whitlock. She was brought here to Augusta County where she was detained, where she was taken by abduction. Absolutely no issue about that. Second of all, I submit to you that there is no issue why these two men did it. They did it, one, to rob her, to obtain something of benefit from her (inaudible) and also they did it so that one or both men could rape her. No question about that. Now the laboratory technician who testified said there was sperm present. She cannot say whose it was. She can't say it was this man's. It does not appear

to be this man's (inaudible). But Mr. Henderson has not been arrested, his cannot be tested. Look at all the evidence when you consider that the fact that this young girl was found nude in the woods and that there was sperm present. The last time that [817] Leanne had had sex with somebody had been the night before, eighteen or twenty hours before and yet the sperm was present when the body was recovered so there is no question why they intended to abduct her. They wanted to rob her and they wanted to sexually molest her. And third, there is no issue at all that these two men acted without any reason at all, any legal justifications. So those three things I submit to you really are not in question at all. Another thing that is not in question, Leanne Whitlock was robbed. Absolutely no question about that. The last time that she was seen by her friends, she had her boyfriend's car, she had just gotten paid in cash from her job which she had in her pocketbook. She had her ID cards in her pocketbook. She had her watch and one of the witnesses even remembered her having her pearl earrings on. When she was found, she had nothing, absolutely nothing at all. So there is no question at all that she was robbed. There is no question at all either that she was murdered, that is a given fact in this case. Somebody willfully, deliberately and with premeditation killed and murdered Leanne Whitlock. And really there is no question that this was during the commission of [818] robbery or abduction or rape. One or all three of those. Really no question about that. There is no question as to what the murder weapon was I suggest to you. This thing right here, sixty-nine pound rock was found there at the murder scene beside two holes and what was found on the rock? Human

Blood. And what happened to Leanne Whitlock? Her head was smashed in with some object which the medical examiner said very possibly could be a rock like this. There is no question about the murder weapon. There is no question where it happened. It happened about twenty-five to thirty yards from where the body was found. And we know that because of the two indentations there. The small one and the large one. You all can get the feel of this size of these indentations from these casts. Not only were they found there but what was found in them? Human blood and hair that matched Leanne Whitlock. Hair that had been forcibly removed from her head. Hair that had come out when this rock was hurled down on her head. There is no question about that. Now what is the difference in the size of these rocks, I mean these imprints, indentations, why is one so much bigger than the other one? Very simple reason for that. Dr. Oxley, the [819] medical expert, testified that she was hit at least three times with this object. What I suggest to you is that she was hit once, her head was driven down about three inches into the ground. She was either rolled over or bounced over when the rock hit her. The rock was taken up again and thrown down against her head again, driven down another three inches into the ground and then just to make sure, a third time it was thrown down in the same place and that is why you have one so much larger than the other one. The evidence is exactly consistent with Dr. Oxley's testimony. So it is really no doubt about where it happened and what the murder weapon was. It was not a gun, it wasn't a knife. It was this thing here, it is to [sic] big to be called a rock and to [sic] small to be called a boulder. I don't know what you call it, I'll

just call it a rock but this rock here, sixty-nine pounds, was the murder weapon. Those things can't really be disputed. Now the first question that you have to deal with is who was involved, who committed abduction, who committed a robbery, who was involved in the murder. Who was there. Ladies and gentlemen there were at least three people there based on the evidence. One, there was a man by the name of [820] Ronald Henderson. One was an unknown white female that has not been discovered yet. And the third one, was this man sitting right here. I submit to you that is beyond any question at all. Look at the evidence, excuse me. Look at the evidence that you have connecting this man with the case. First of all, is the testimony of Virginia Smith and Donna Warner. They were both at the mall. They ran into Mr. Henderson and Mr. Strickler. Donna Warner knew them before. She talked to Henderson, Stoney here was introduced to her, positive ID and Virginia Smith, the head of Security at Valley Mall. What did she testify to? She was trying to watch these two men because they were suspicious, they were acting suspicious. And she tried to follow them around all that afternoon. And the last time she saw them was about six forty-five P.M. and they were heading away from where she was down here, up to the northern part of the mall to where the main entrance is. That is at approximately six forty-five. So she puts them going towards where Leanne was kidnapped at the approximate time that it happened. You have the testimony of Leanne's roommate who says yes she left the house at approximately six forty-five to go to the mall to [821] take her boyfriend's car back. So you have the two men and you have Leanne coming together there at the mall. And

we are lucky enough to have an eyewitness who saw that happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stolzhus was there, she saw that happened. She said she had been inside the mall and she ran into these two men and this girl. And she named the two men, "Shy Guy", Mr. Henderson, "Mountain Man", the defendant in this case. And she said the defendant was acting wild. He was agitated. She became nervous around him so she was trying to keep an eye on him. She didn't know what he was going to do. Finally she finished her business in the mall. She and her fourteen year old girl went outside, got in their car, proceeded to go home. The next thing she knew she got behind the vehicle of Leanne Whitlock. Right in this area here. They proceeded down to approximately where the main entrance is. And what happened then? "Mountain Man", the defendant, came running out of the mall, ran up to this van, tried to evidently get a ride, (inaudible) ride with a van, couldn't do it. He got mad, he banged on the side of the van. He ran [822] back to a truck, couldn't get in the truck either so he ran back to the mall and all of a sudden comes running back out and that's when he goes to Leanne's vehicle. Ms. Stolzhus was right behind her. She said that this man tried to get the door open and Leanne tried to stop him, she kept trying to lock the door. All of a sudden the door flew open. He jumps in. He doesn't sit in the passenger's seat but moves over right next to Leanne. That's when these other two people come out of the mall, come to get in the car. Leanne can't be here today to testify. But her actions that day shows what was going on in her mind. At that point she decided to

take a chance. She leaned on the horn, blew the horn, kept her hand on the horn. The two people ran back to the mall and what did this guy do, did he get out? No he started hitting her and he hit here and he hit her until he made her quit blowing the horn. And then the other two people came back out and got in the car. Ms. Stolfus drove up beside the car and she said I kept asking the girl was she alright, was she alright? The girl wouldn't say anything. She said when the girl, I asked her, she would look at me and she looked down beside her. She looked at me and then looked down again. Why was that? I [823] suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. That was pressed right up against Leanne. So the witness drove on by. As she drove by, Leanne mouthed the final words that any decent citizen heard her say and that was help. That was how she was feeling, she was desperate right there. So Ms. Stolfus pulled over and Leanne's car started driving away. She blew the horn again trying to get help. It didn't work. Ms. Stolfus positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him. Ms. Stolfus followed them a little ways and then turns away. It was the last time Leanne was seen alive by anybody. What do we know happened next from the evidence? And that is all we are concerned with today is the evidence that was presented. The evidence shows that approximately half an hour to forty-five minutes, Kurt Massie, who has nothing at all to do with this case, was driving down, or was riding with

with another man, coming down 340 to go pick up his little girl. When they approached the [824] entrance to this field, Mr. Massie was going north on Route 340, he said there was a slow car coming the other way, some other cars passed it so they had to stop almost, come to a complete stop. That he knew this road from younger days when they used to go down there and drink beer and party. He knew where it was. He knew how muddy it was. And he was able to see that there were at least three, possibly four people in the car. He was able to see two white men and a white girl. He said I can't identify the white man that was in the back seat. I can't identify the white girl but I can positively and absolutely identify the driver. And who was the driver? This man right here. The Commonwealth has placed him driving the murdered girl's car down into the scene where she was actually murdered. Just a half hour to forty-five minutes after she was first kidnapped. That is very strong evidence right there, putting him there at the murder scene. What happened next in time? Well approximately a half hour later, eight o'clock, this was at seven-thirty that Mr. Massie saw them. Eight o'clock at Buddy's Market right out there on 340 near the place, Lee Smith sees this car, a small blue car, with West Virginia tags, two men in it. A dark haired man and a [825] blonde haired man. He says I can't identify them today but they were there. This was at eight o'clock. There were no girls with them. We know what happened to Leanne Whitlock, her head was bashed in. We don't know what happened to the white girl. At that point, she disappeared. Maybe she was down in the back seat hiding, scared to death. Maybe she had taken off, nobody knows. But these two men are still in the car at

eight o'clock. So we lose them for about an hour after that. This is eight o'clock. The next thing you know, nine o'clock, where do they show up to have a good time? Dice's Inn here in Staunton. There is not just one or two witnesses, three or four witnesses who can place them at Dice's Inn. They came in, their hands were dirty. They started dancing and drinking beer, having a good time. Mr. Strickler here picked up Donna Tudor. Mr. Henderson tries to pick up Nancy Simmons, he even gives her a watch, real nice of him, giving away a dead girl's watch to Nancy Simmons. They stayed there until the place closes and when they close they leave. Donna Tudor, Tommy Strickler, Ronnie Henderson. And what do they leave in? They leave in Leanne's boyfriend's car and they take off. Later on the car is recovered, fingerprints taken [826] and this man's fingerprints are all over that car. His footprints are all over the car. His own sister said that the day after the murder he was down at her house in a little blue car. Lunchtime the day after the murder he was seen in New Market in this little blue car with a West Virginia tag and he is also very good to his new girlfriend. Because he is good enough to give her a nice pair of earrings, Leanne Whitlock's earrings, that she was wearing when she was murdered. Ladies and gentlemen I submit to you that there is no question, really not an issue. This man abducted Leanne Whitlock, he did so for the purpose of robbing her, to obtain money or other benefits from her and he did in fact rob her. He took her car, he took her earrings, he took her credit cards, identification cards which he and Donna Tudor tried to use down at Virginia Beach. He took all those things. So there is really no issue about the robbery and abduction charge.

The only issue in this case is whether or not this man is guilty of capital murder or first degree murder. That is what this whole case is all about. He is guilty of one of the two and you have to decide which one he is guilty of. Capital murder, the Judge has given you instructions on [827] that. What this instruction says is the Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. You may find the defendant guilty of capital murder if the evidence establishes that the defendant jointly participated in the fatal beating, if it is established beyond a reasonable doubt that the defendant was an active and immediate participant in the act or acts that caused the victim's death. In Virginia the person who actually kills another person, is the only one that can be convicted of capital murder, however, if two people jointly beat somebody to death, then they are both guilty of capital murder. So if you believe in this case that Mr. Henderson and the defendant jointly beat Leanne Whitlock to death, then he is guilty of capital murder. If you believe that Mr. Henderson alone killed Ms. Whitlock and that this man was just there watching or sitting in the car or doing something else, [828] looking the other way and didn't take part, then he is not guilty of capital murder, he is guilty of first degree murder. Those are your only two choices or not guilty and the evidence does not justify not guilty. Who killed her? I submit to you it

was Ronnie Henderson and Tommy Strickler, the defendant in this case. It is a shame that the only people that were out there was Tommy Strickler, who is on trial today. Ronnie Henderson who is still on the run. This unknown white woman who can't be here today because nobody knows who she is. And Leanne Whitlock who is dead. Those are the only four people who can be here to give direct testimony about what happened. Since you don't have these four people you must look at the other evidence in the case. Let's start with Donna Tudor. Ms. Tudor, no offense as you notice, is not the smartest person in the world. It is true that she was arrested up in Harrisonburg. She was charged with Grand Larceny of this vehicle and she agreed to testify to try to get the charge against her dropped. It is no question about all those things, we agree with those. But does that make her a liar about what she testified to. Look at what she said. She said she was with the two men that night at [829] Dice's. She got there at eight o'clock. There is three or four witnesses who put her there at eight o'clock. She was not with them over there in that corn field or in the woods. She couldn't have been because of the time period. She was at Dice's. Even before they arrived, a hour or more before they arrived, so she could not be [sic] there. They picked her up. She went with them. They were driving around, Henderson was all upset. He was driving recklessly, almost ran into a truck. Mr. Strickler pulled his knife out and said I will kill you if you don't calm down, it shows he had his knife that night. Henderson calmed down and they rode around for quite a few hours that night trying to get marijuana. Went to two or three houses. The first thing that Ms. Tudor was able to

tell us, was about them talking between the two of them. She said they were talking and joking. They were talking about "it" in a rock crusher. And she assumed that whatever "it" was, they put it in a rock crusher. But is that what these two men talked about? Were they making a sick joke about this rock being a rock crusher or were they talking about how the rock crushed her. Ladies and gentlemen there is no way Donna Tudor could have known about this rock crushing this girl when [830] she was arrested and talked to the police unless somebody told her. That what the whole thing (inaudible) if you believe everything else that she is bias [sic], which she may be, she has a reason for coming here testifying which she does, that doesn't change the fact that she knew about this rock and the rock crusher. What else do you have though? She said she talked to Tommy. That they were talking about "it", that they started calling "it" a nigger. That she talked to her new boyfriend, Tommy Strickler about "it", she talked to him about the cut on his hand. She said he had a cut on his knuckles and that is important ladies and gentlemen. That is something you expect when you are dealing with a rock like this one. When you are trying to pry the rock up out of the ground to use. You expect little cuts and bruises. So that is important and you saw that no other witness that testified disputed that. Nobody even mentioned it. Nobody was asked about it. She said he had a small cut on his knuckle. And she asked him about the cut on his hand and what did he say? Well I got into a fight with "it". And she said well "it", is it a female or a male? He wouldn't tell her. When she said well is "it" black or white and he said "it" is a [831] nigger. He said I kicked

"it" in the head. It's not going to cause me anymore trouble. Why did he say that? He said that because he had killed Leanne Whitlock out there. He knew she couldn't testify against him. She had fought with him in the car. She had caused some trouble but he had gotten rid of "it". That's a terrible way of referring to somebody as "it", but that is what he was doing. They went to Virginia Beach, spent a few days down there, tried to use Leanne's credit card, couldn't do it, couldn't figure out how to do it. Came back from Virginia Beach. One of the first things he got his mamma to do was wash his pants for him. Why was that? Donna said there was blood on them. We know there was blood on Henderson's pants, if those were Henderson's pants, the ones that were in the tree at Mr. Strickler's mother's house. We know those were bloody. Ms. Strickler, Mr. Strickler's mother said those were Henderson's pants but she is the only witness who could say (inaudible). And yet we have a clean pair of pants here that Donna Tudor says are his pants, had blood on them and his mother washed them. It would have been nice if they could have been analyzed before they were washed but they weren't recovered in time. She [832] said we went there and there is an old car back there and he put stuff in the car. No, no, he told her to put stuff in a bag and they put it in the car. And what stuff did they put in the car? These ID cards, they put those in. Put a map of Virginia Beach in the car which shows they did go to Virginia Beach, that substantiates her story. And they put a black T-shirt in the car. The Harrisonburg police went out there and they recovered this bag and sure enough everything was there that the girl said there was including this T-shirt. This T-shirt is important. It is

important because of Ms. Stolfus and the testimony of Donna Tudor. Donna Tudor said he was wearing this T-shirt that night when he picked her up. And what did Ms. Stolfus say he was wearing? Blue jeans, a coat and a grey T-shirt with Harley Davidson on it. Just like this T-shirt here. And what is so important about this? He was wearing, we were able to get it before it was washed and sure enough there is human blood on it. That connects him to the murder too. That backs up what Ms. Tudor was telling us. In addition when she got picked up, she talked to the police, gave them a statement and said hey he gave me some things and sure enough one of the things that he [833] gave her was Leanne's earrings. They aren't damaged, evidently she was made to take them off before her head was smashed in with this rock and who has them, once again this man over here. And what else is there at the scene? You have a young woman, nineteen years old, she was kidnapped, she was taken out there. She was either forcibly made to disrobe or they disrobed her themselves. The blouse and bra were thrown down on the ground. Was forced to take off her watch or it was taken off for her. Her earrings were removed and she was placed on the ground. Ladies and gentlemen I submit to you there is no way one man could have done this crime. This is not a small rock that you can pick up and hold somebody down and just keep (inaudible) in the head. If one man is going to pick this up, it is going to take two hands. What was Leanne doing the whole time this was going on? Was she just waiting there, laying there peacefully for the end to come? Or did somebody have to help hold her down so that her head could be bashed in? One or more people. The second and third blows, she was

unconscious. But there is no evidence at all that she was unconscious on the first blow. This is not just a small rock here. Take it to the juryroom, lift it [834] yourselves, sixty-nine pounds, four ounces (inaudible) of solid rock. Based on his statements, he took part in this beating and killing. His own hair, well I won't say, that's not right. The experts said that the hair found on the bra and the shirt was alike in all characteristics as this man's here. There was no difference. And this hair had been torn out too. When? When she was struggling with him. Ladies and gentlemen I submit to you that the evidence is sufficient for you to find that the defendant is guilty of capital murder. If you believe the testimony of Donna Tudor along with this other evidence, the other evidence backs up her testimony. Now, how does the defense attempt to impeach Donna Tudor? Well they made a last ditch effort, desperate effort by putting Jay Tudor on the stand. He was a very credible witness. He testified that he and Donna are split up. She said she was living with another man. She said that, he said, he said, Jay Tudor said back in March she came to his home or his parent's home, Junior Knight's home out in Craigsville, Augusta Springs, and that while there she told him that she was with the two men that night. He also said that the girl had gone down here to Staunton, [835] picked Donna Tudor up and that she and the girl then went back to Harrisonburg and picked up the two men in the car and then later on they went out to this corn field where Henderson killed the girl with his fist and his, the rock, while she and Strickler stayed in the car. That is absolutely unbelievable with the evidence that you have. First off the evidence positively

shows that Leanne Whitlock did not come down to Staunton and pick up Donna Tudor. There is no evidence they even knew each other. The evidence positively shows that Donna Tudor and Leanne Whitlock did not go back to Harrisonburg and pick up these two men. We have got an eyewitness to what happened, that is just unbelievable. The evidence shows that Donna Tudor could not have been the girl with them that night because she was at Dice's at eight o'clock while these men were still over there. And in addition, Jay Tudor took the stand and he testified to all of this and I asked him about his conversation with Sergeant Campbell yesterday. I asked him, well did you tell Sergeant Campbell how Henderson killed the girl? He said yeah I did. I said you told Sergeant Campbell he used his fists, didn't you? He said yeah, but it was a fist and the rock. He never mentioned that to Sergeant [836] Campbell. The first time he ever mentioned the rock was when he saw it here in front of him this morning. Absolutely unbelievable. I submit to you that Jay Tudor is just mad at his wife. He is mad that she split up with him and that she is living with another man. He is just trying to get her in trouble. If this is true why didn't he come forth in March or April or May and tell the police what she said? Why wait until the day of the trial to come in and tell this story? There is no evidence at all to support what he said. There is plenty of evidence to show that it is not true. So Donna Tudor's statement, I submit to you, is true. Now Mr. Ashby talked to her, who is the investigator for Mr. Bobbitt, and at some point evidently she told him that Tommy Strickler was saying these things in his sleep. Fine, fine, he had to know them though. He couldn't have known them unless he was there and was

helping take part in it. And his conversation between him and Henderson took place in the car when he was wide awake when they were laughing and joking about the rock crusher. That can't be disputed. Ladies and gentlemen you have to decide if this man is guilty of capital murder or first degree murder. Under Virginia law we have what we call [837] the Felony Murder Rule, which says if you commit a robbery or an abduction or a rape or anything like that with another man and during this robbery the other man kills somebody then you are guilty of first degree murder. So if you believe from the evidence that this man did not take part in killing Leanne Whitlock, then you should find him guilty of first degree murder. If you believe from the evidence that he did take part in killing Leanne Whitlock, then you should convict him of capital murder and that is as simple as that. It's one of those two things. The evidence shows that he was involved in this robbery and abduction so he cannot be found not guilty of either first degree or capital murder, it has to be one of the two. I submit to you the evidence is clear. He made statements about his involvement. The wound on his hand, the blood on his own shirt; all this shows that he was involved in this brutal and senseless killing. The next issue that you have to decide will be punishment. I ask you to find him guilty of capital murder. I ask you now to find him guilty of also robbery and abduction as charged in the indictment and instructions. If you convict him of capital murder, you will not decide at this point what his punishment shall be. [838] There will be other evidence presented before you decide whether or not he will get life in prison or the death penalty. If you convict him of robbery and abduction now

and first degree murder, then you have to impose the penalty that you feel is appropriate. Let's not talk about capital or first degree murder right now, let's deal with the robbery and abduction. What are the proper punishments for these? On the robbery charge you can sentence him any place from five years to, in the penitentiary to life in the penitentiary. On the abduction charge you can sentence him from (inaudible) years in the penitentiary to life in the penitentiary. Now let's go ahead and deal with first degree murder too. First degree murder, you can sentence him any place from twenty years to life in the penitentiary if you convict him of that and I suggest to you the evidence does not support that conviction. It supports capital murder though. If you do convict him of that, what punishment should be imposed? Ladies and gentlemen this was a brutal killing. Absolutely senseless, heinous in every detail. Leanne Whitlock, there is two photographs here. One which shows a happy, beautiful young woman as she looked before her death. And then the medical [839] examiner photo, which shows her face after she was killed. Now there is some, as he said, there is skin slippage here but this gives you an indication of how she looked. What is the proper punishment for somebody who does this to a young woman like this? You know, Leanne's only thought that day, the only thing that she can be blamed for is that she went to the Valley Mall at the wrong time. These two men wanted a car so bad. Mr. Strickler wanted a car so bad that he was willing to kidnap for it. He was willing to rob for it. He was willing to kill for it. Ladies and gentlemen there is only one proper punishment in this case. Justice demands that if you do find him guilty of robbery and abduction and first degree that you impose the maximum penalty on all three

charges. Life on abduction, life on robbery, life on first degree. This girl was kidnapped at six forty-five, six fifty. By eight o'clock he had murdered her. She was dead. For a hour to a hour and fifteen minutes this woman lived through hell. When they first kidnapped her, she didn't know who they were. She didn't know what they wanted. She didn't know whether they were going to kill her or not. Before that, Ms. Stolfus said she was singing, she was a happy [840] young woman. And yet they put here through this. There is no excuse for it. There is no justification for what these two men did. There is no reason to show him any mercy in your sentencing. This woman was brutally kidnapped, brutally robbed, brutally murdered. I ask you to find him guilty now of robbery and abduction and I ask you to sentence him to life in the penitentiary on both of those charges. I ask you to also find him guilty of capital murder at this point and a sentencing hearing would be held at a later time. Ladies and gentlemen this is a long case and as I said this is an important case. You are this man's jury. But you are the jury for the Whitlock family too. Her mother and dad, her sister. You are the jury for the people of Augusta County. You are members of the citizens of August County. It is your duty to decide what somebody who does these types of crimes should be punished with. And I submit to you that it should be the maximum punishment. So I do ask you to find him guilty of capital murder, robbery and abduction. Go ahead and sentence him on the robbery and abduction charges to life in the penitentiary and the sentencing on the capital murder, we will deal with that at a later time. [841] Thank you.

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VIRGINIA: IN THE CIRCUIT COURT OF THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

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[841] JUDGE: Thank you Mr. Ervin. Mr. Bobbitt. Where are the instructions?

MR. ERVIN: Right here Judge.

MR. BOBBITT: Your Honor if it would please the Court. Ladies and gentlemen of the jury, we began the other day in the trial by asking all of you the questions that have to be asked in this type of a case, in the whole series of it and each one of you was asked if you would decide the case solely on the evidence that was heard, presented from the witness stand and each of you agreed that you would do that. In a few minutes it is going to be your function to decide the case based on the evidence you heard and the key question in this case as Mr. Ervin has indicated, is that you will have to decide what the evidence proves about Mr. Strickler's participation in the murder that took place in this case. Now you have received the instruction on capital murder and I want to go over that. I know Mr. Ervin read part of it. The capital murder instruction lists the elements that are part of that offense, that have to be proved to establish that offense. And the first element, the first thing that is listed is that the [842] defendant killed Leanne Whitlock. That's the first and primary element of the capital murder charge, the instruction. There is another instruction which defines that element a little bit. It says that the Court instructs the jury that the evidence must establish beyond

a reasonable doubt that the defendant actually caused the death of Leanne Whitlock, before you can find him guilty of capital murder. One who is present aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. And Mr. Ervin has also gone over that entire instruction with you and you will have these back with you so that you can go over them yourself. I want to review with you now, some of the evidence, particularly in regard as how it, what it shows about Mr. Strickler's participation in the murder. The evidence shows that two men and a girl were at the mall. Ms. Stolfus said she saw these people there and she met him and that she saw them abduct Leanne Whitlock. They come and beat on the car, got in the car and drove off in it. A little bit later there was a man that said that he saw the car coming down 340 and there appeared to be four [843] people in the car as it turned in this lane that he was familiar with. He saw just three people at that time and it is not explained as to why there were four people and then three people but perhaps the person in the back had pulled down somebody. He said the person in the back and their arms sort of up in a funny manner. But he says that he identified Mr. Strickler as being the driver of the car and that there was a girl, a white girl, who was in the passenger seat next to him. The evidence clearly establishes that the murder took place in that field where the car turned down. That that is where Leanne Whitlock was killed. There are holes in the ground there. There is blood in the holes in the ground, there was hair and there is a rock and there is blood on the rock and the body was found there and there is the medical testimony,

the evidence that the blows, that type of wound, the fractured skull. That there was instantaneous death and that, it's clear that that is where Leanne Whitlock was killed. The next real direct evidence we have is Henderson and Strickler were seen about nine that night at Dice's Inn. Several of the girls testified, said that they saw them there that night. They saw them leave with Donna Tudor that night. Donna [844] Tudor went with them. The next witness in the sequence of events for that night is that the witness, Mr. Workman, said that Henderson came to his house about four or five o'clock that night. Came in, appeared agitated, was rubbing the blood on his blue jeans and he said I've killed somebody. I didn't want to do it but I had to kill someone. The evidence is that shortly after that Mr. Strickler and Donna Tudor leave, leave Henderson there, go, they end up going to Virginia Beach. They are at Virginia Beach for about a week and they get back, shortly after they get back here, the car breaks down and the car is left at the church and Mr. Strickler and Donna Tudor are arrested. When they are arrested there are items in their possession, of course they are connected to the automobile, the automobile that Leanne, Strickler had. There are credit cards, earrings, Donna Tudor had the earrings. There are personal belongings that were in Leanne Whitlock's possession, that are in their possession after they are arrested here in Augusta County. Now all of that shows pretty clearly and without much dispute as Mr. Ervin indicated, that there was a robbery and that there was an abduction and that a murder took place. But it doesn't prove who [845] killed Leanne Whitlock. And there is additional evidence that I want to get in to now that tends to go to that point. A

part of that is that later on things were found at this sight where the body was ultimately discovered. The first thing that was found was Henderson's wallet with his identification in it. The next thing that was found was a shirt and bra that was sent to the lab. There was, there was the lab analysis and the experts who testified said that they were hairs that came off of the shirt and bra. They never testified as to whether the hair came from the shirt or the bra. It was all submitted as one package and there is no evidence as to what, where the hairs came from. Just that hairs were removed from the shirt and bra that were sent were identified, were consistent or similar to the hairs, to Mr. Stricker's hair. The man said that that is not a positive personal identification but they are consistent with Mr. Strickler's hair. There is also no evidence as to whose shirt and bra that was. There was never any evidence that was Leanne Whitlock's shirt or her bra. The only evidence is that this piece, items were found there at the scene just like Henderson's wallet was found there at the scene. And that these [846] hairs came from somewhere on them. We don't know whether it is the shirt or the bra but they came from somewhere on them. And I would submit to you that the evidence as I said clearly shows that an abduction took place and that there was a struggle during the course of the abduction and it's, if this was Leanne Whitlock's shirt, it's conceivable that the hairs that were on there got there during the course of the abduction. We just don't know that, we don't. And that point we have to speculate about as to when they got there and what the significance of it is. We can speculate about all of the evidence that comes from the scene itself. Were there two people there, were there three people

there? The security guard at, that testified first from Valley Mall said that she saw Henderson and Strickler walking around and that there was, she never saw any woman, never saw a female with them. But Ms. Stolfus was definite, was positive that there was a woman and she described her. Said she was referred to as Donna. Said that they said this is Donna or Sharon. We can speculate about what the people that were there were doing. If there were three, what were two doing and what, who was doing what? Was one person turning the car around while the others [847] were doing something with Ms. Whitlock or, but we just don't know from the physical evidence and from the, from what was submitted, we don't know what was taking place. We have to guess and we have to speculate about what happened. You've been given the instructions and it says suspicion or probability is given, probability of guilt is not enough for a conviction. In other words, it is not enough to say that Mr., Mr. Strickler was probably doing this or he probably had a part in it or it was very suspicious. It has to be proved beyond a reasonable doubt that he actually was the person who killed Leanne Whitlock before you can find him guilty of capital murder. And there is evidence that points to, to Henderson. He was identified at the mall, he jumped in the car, he apparently was in the back seat. The man that was there was in the back seat. The woman was in the front seat. There is a white woman. So there is evidence that, that Henderson was sitting in the back seat and there is an inference that that's where Leanne Whitlock was at that time when they turned in the lane. Henderson's billfold was found in the field so he was definitely there. Henderson had blood on

his pants. Now there are several people that have testified that there has [848] been blood on his pants. Workman said that he was rubbing the blood spot on his pants when he was there in his apartment. The lab report says that the pants that Henderson took off at, at Ms. Silvious's house had blood on them. That's an indication that he was there. And on top of all of that he made the statement, that I have already referred to, that he had, that very night that he had killed someone. So there is evidence that certainly points to him. There is also evidence that points to, to Mr. Strickler. There is the testimony of Donna Tudor but I would submit to you that her testimony is just not credible. First of all, she has made a deal with the police. She has been charged in this. She came back, she was arrested, she was in the car, she had, she had the earrings on and so she says I will make the deal, I will tell you what you want to know if you will just let me off, get me out of this charge and she said that was what the agreement was. In fact, even so, the Commonwealth wasn't, didn't trust her enough to, to believe that she would be in Court so they had her put in jail a couple days before the trial so that she would be here for her to testify. That's how reliable she is. On top of that was the testimony of her estranged husband, [849] Jay Tudor, and I really, I don't know what you need to make of that or not make of it but anyway he says that she, she made the statement to him that she actually was there at the place. Maybe she made a statement or maybe she didn't make a statement to him. She said that she was there at the house but she denied making the statement. But there is some evidence indicating that she could have been there. There was several witnesses that say there,

there was this woman, this woman seems to fit Donna Tudor's description. The name of Donna was used. It's certainly possible that she was there and if that is the case, she at this point isn't going to acknowledge it. And if she is there, she is certainly able to tell the police what they want to know. She also, what she says isn't clear. She is very vague about what she says. She says, she said they said something about "it". She wasn't really, we don't know whether that refers to the incident with Leanne Whitlock or does that refer to something else because it is ambiguous. What does "it" mean when she is referring to it. She keeps using the word in her testimony. She always says they said this. She never says who did what, she just says they were whispering and I couldn't really hear [850] them and they said something but I really couldn't hear it. So her testimony is very vague. Mr. Ervin tried to get her to say certain things that indicated that, that she had heard Strickler say something but she really never said. She said all I heard was this whispering that they were saying that something had happened and I overheard something about a rock crusher and they said these things and she never really explained what that meant. Now she did, she said, she also said that there was blood on Mr. Strickler's pants. But she is the only witness who said anything about that. There was, the witnesses that the Commonwealth called from Dice's Inn. They were all asked how Strickler was dressed that night. And one of them said he was dressed very nice. His pants were a little dirty but nothing out of the ordinary. She didn't say anything about any blood on the pants and she had indicated she observed them. The, Mr. Strickler's mother who of course is a biased witness, she is his mother,

testified that she washed the laundry and that there wasn't any blood on the pants, on Mr. Strickler's pants when she washed them. But in addition to that, the lab technician said that there is a test that can be done to determine if blood is present even after [851] the clothes have been washed and we ran that test and that didn't show that there was any blood present. So there, so there's no evidence except for Donna Tudor's statement that she, and she is saying that this was a week afterwards when the clothes were washed. There was blood on there. But nobody who saw Mr. Strickler that night or the next morning said anything about that. In fact the ones that were asked directly said they didn't see any blood. There is, there is the black shirt that has been put into evidence and that was shown to all the witnesses. Some of them said they identified it, some of them said they didn't. One of the girls at Dice's, well she, Mr. Ervin said is this the shirt that Strickler had on and she said no that's not the shirt. Ms. Stolzhus said I can't say that's the shirt he had on. So there is some connection, I mean there is some confusion as to whether that is the shirt Mr. Strickler actually had on that night. The only thing that we know about it is that that is the shirt that came back from Virginia Beach because that is the shirt that was there in the car. Donna Tudor said it came back from Virginia Beach because she said she put it there in the car. There were stains on that, some body fluids, semen and blood. If [852] Strickler and Donna Tudor had been together for the whole seek and the shirt gets back there, we don't know where those stains came from or how they got there and there is no, there is no evidence to say that those things are identifiable with, with Leanne Whitlock

or that they in anyway originated from the night that the murder took place. So there is really no connection between that black shirt and the murder itself. It is just a piece of evidence that came in a week or so later. I've already referred to the, to the hairs on the shirt and bra and that's a piece of evidence that connects Mr. Strickler to the scene. It was found there at the scene, it had his hair on it. But what does it mean? The meaning of it is not clear because there was this abduction. There is no evidence as to where the shirt and bra came from or where the hairs came from off of there. Conceivably it could be the (inaudible) of the other woman that was, that was present. We just don't know that. So the significance of that is not clear. And it certainly doesn't prove that Tommy Strickler was involved in the murder other than he was there. And I'm saying involved, I mean he was the actual, the perpetrator of the murder. What there isn't is, there isn't evidence [853] to show that he, that Tommy Strickler was right there around the murder scene. There were fingerprint and footprints introduced in the evidence to show that Tommy Strickler was in the car but there wasn't any evidence of that sort, no footprints, no fingerprints to show that he was right around where the rock was and that he was right around where these holes in the ground were or that he was around where the body was. There is nothing of that sort to show that he was right there where the murder took place. There is, there are no, there is nothing, no hair or anything of Leanne Whitlock that was on his clothes that would show that, that he was in close contact with her. There are no eyewitnesses. And of course, there wouldn't be. But in sometimes they are. I mean in some cases of a murder there are

witnesses and certainly that, that helps prove things. For instance, in this case, in the abduction, there is an eyewitness, there are eyewitnesses, so compare the way you feel about the certainty you feel that Tommy Strickler got in the car and took the car, to the uncertainty you feel about what happened at the sight of the murder and that is the sort of judgment you need to make. You need to be certain. You need to [854] believe beyond a reasonable doubt that he was the actual perpetrator. The person who committed the actual murder, before you can find him guilty of capital murder. Now I want to go over with you briefly the first degree murder instruction. That instruction lists the elements also and the elements of that offense are that Leanne Whitlock was killed. That the killing was malicious. That the killing occurred in the commission of a robbery, rape or abduction. That the defendant was a participate [sic] in the commission of this robbery, rape or abduction. That the defendant or another participate [sic] in the commission of this robbery, rape or abduction killed Leanne Whitlock. So that certainly seems to fit the situation in every one of those elements. Whereas on the other hand, the capital murder instruction, you have to speculate. You have to guess as to, to reach the elements of that offense. And there is also the instruction that if you have a reasonable doubt as to the grade of the offense, then you must resolve that doubt in favor of the defendant and find him guilty of a lesser offense. If you have a reasonable doubt as to whether he is guilty of capital murder or first degree murder, you shall find him guilty of first degree murder. So that, [855] that tells you that you, if you have a doubt, if you have a question, you have to resolve that doubt with the lesser

offense. In this case, the Commonwealth has not established who did the actual killing. They have got theories about somebody had to be doing this or maybe two people would have had to pick up the rock or maybe somebody would have had to hold the person down. But those are just theories, there is nothing in the evidence to support that. They haven't established who delivered the blows to the head of Leanne Whitlock that actually killed her. You would have to go outside the evidence to say that Tommy Strickler did it. You would have to speculate that he was there doing something that there is no evidence that he was doing. And you are not suppose to go outside of the evidence. I would ask you in this case to return a verdict of guilty of first degree murder and not guilty of capital murder. Thank you.

JUDGE: Thank you Mr. Bobbitt. Mr. Ervin.

* * *

VIRGINIA: IN THE CIRCUIT COURT OF THE
COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

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[855] MR. ERVIN: May it please the Court. Ladies and gentlemen Mr. Bobbitt is an excellent defense lawyer. He has been in the business a long time and he does like many defense lawyers [856] do. You try to get the jury to just look at one detail at a time. Look at Donna Tudor's statement, not look at the other evidence all at one time. What you have to do in this case, is you have to consider all the evidence together. You can't look at one piece in a vacuum. You have to look at it all together to determine this man's guilt or innocence. He read you an instruction dealing with the crime of capital murder and he read you the first paragraph of that instruction. He did not go into the second paragraph because that is the paragraph that gets his man convicted of capital murder. This instruction is the one that I read before and I am going to read it one more time because this is the whole case right here. The first paragraph states, the Court instructs the jury that the evidence must establish beyond a reasonable doubt that the defendant actually caused the death of Leanne Whitlock before you can find him guilty of capital murder. One who is present, aiding and abetting the actual killing but who is not the immediate perpetrator is a principle in the second degree and may not be found guilty of capital murder. The second paragraph which Mr. Bobbitt did not read to you states, you may find the defendant [857] guilty of capital murder if

the evidence establishes that the defendant jointly participated in the fatal beating. If it is established beyond a reasonable doubt that the defendant was a active and immediate participant in the act or acts that caused the victim's death. That is what this whole case is about. This is not a case of one man killing Leanne Whitlock. This is a case of two men acting jointly to kill Leanne and that's what the whole case is about and that is what the defense tried to divert your attention away from. The Commonwealth agrees with Mr. Bobbitt on one point. Mr. Henderson killed Leanne Whitlock, just as this man did. They both acted jointly that is what the evidence, the bloody coat, the pants, the statement he made to his friend that he had killed a nigger that night. Mr. Henderson is guilty. I submit to you, so is this man. Just because Mr. Henderson is guilty doesn't mean that this man is not if they jointly cooperated in killing her, they are both guilty of capital murder. Now Mr. Bobbitt made a big deal about the bra and the (inaudible). He said nobody positively identified these as the one Leanne was wearing. That's true but what did Sonja Lamb and Beth Rogers say? They both said that Leanne [858] Whitlock was wearing a creme colored blouse when she left. Well I submit to you that matches the description of what Leanne was wearing. We can't say this is her blouse. Just as tomorrow you may not be able to say the person beside you was wearing a blue shirt and that this is the blue shirt. All they can do is describe it. This is Leanne's blouse I submit to you. There is no question about that. It was found right there within thirty to thirty-five yards of her body. No question about that. Mr. Bobbitt says Tudor is not believable. Donna Kay Tudor is not believable. That maybe she was

there and that is how she knew what to say. The evidence don't justify that. She was at Dice's Inn at eight o'clock while these two men were still over on Route 340. The evidence doesn't show that. And if she was there, she would be more specific about what happened. She wouldn't say they said something about a rock crusher. If she was there she would have said the rock crushed her. She was just repeating what she heard from these two men. And Mr. Bobbitt said well Strickler, Strickler, the defendant never said anything himself, it was just the two of them talking. That's not true. Donna Kay Tudor said that she asked him about the [859] cut on his hand. He said he got in a fight with a nigger.

MR. BOBBITT: Your Honor I will object to that because the evidence was not, he did not say that in the testimony. I have a transcript of what he said and he did not say that in response to, I mean she did not say, Donna Tudor did not say that in response to that question.

JUDGE: Gentlemen I am going to let each one of you argue what your recollection of this evidence is and the jury's recollection is the one that matters of what she said or what she didn't say.

MR. ERVIN: O.K., I'll withdraw that. As the Judge told you what you remember is what is important. Not the way I remember, not the way Mr. Bobbitt remembers, it is what you remember. I suggest to you, submit to you that she asked him about the cut on his hand. At some point he said he had a fight with "it". She asked him what "it" was and at some point he said "it" was a nigger. Now Mr. Bobbitt said that she had said that he said that he did anything to it. But remember she said, I

suggest to you, he said that he kicked "it" in the head. I asked her well how did he know to kick "it" in the head? He knew karate. [860] How does she know that unless he told her? And then "it" is not going to cause me anymore trouble. Ladies and gentlemen I submit to you those statements go to incriminate the defendant. In addition, it is true nobody at Dice's saw the defendant's hands with blood on them. But they were dirty, they had dirt on them. The witnesses said that his hands had dirt on them. Where did they get the dirt from? Down that road as he was killing Leanne Whitlock. This car, when it was stolen was clean. There was no dirt on it. Look at how it looks now with the mud all over it and the witnesses said that is how it looked that night at Dice's, had mud and dirt all over it. And he had mud and dirt on his pants because he was out there in the mud and dirt helping kill Leanne Whitlock. And there was no evidence there at the scene, no footprints. It was the middle of winter. No footprints were recovered. But the police recovered everything that was there. Everything that was there was analyzed. The police in this case, the Harrisonburg Police Department and Augusta County Sheriff's Department did a fantastic job on this investigation and that is the only reason the defendant was caught and charged with this crime. Ladies and gentlemen the [861] fact that this man had a cut on his hand, he had dirt on his hands, he was in the possession of the earrings that the dead girl was wearing that night. His statements to Donna Tudor, the black shirt. Now Mr. Bobbitt said Ms. Stolfus didn't identify the black shirt. She is right. She cannot say positively this is it but she said it was a grey T-shirt with Harley Davidson insignia on it and that is what you have. And this

was recovered not from Henderson, not from anybody else in the case, this was recovered from the place that this man had put it, out in a car in a bag with the stolen property belonging to Leanne Whitlock. I submit to you that when you look at all the evidence, there is evidence to show that these two men jointly, not independently, but jointly killed Leanne Whitlock. You are able to look at all the evidence. You can make all reasonable inferences from the evidence that was there. Look at the rock. Feel this rock, feel how heavy it is. Look at the facts before you. I submit to you that one man could not have killed Leanne Whitlock that night the way she was killed. With this rock being thrown down on her head three times, crushing her skull in four different places so that her brain tissue penetrated out. There [862] was no way, I submit to you, that one man could have done that. Ladies and gentlemen I do ask you to find the defendant guilty of capital murder. Mr. Bobbitt by his closing arguments said that the evidence shows first degree murder. It does show first degree murder but it shows more. It shows capital murder and it shows robbery and it shows abduction. And those are the charges, I submit to you, that this man should be convicted of. Thank you.

JUDGE: Members of the jury the case is now with you. It is time for you to retire to your juryroom and reach your verdicts. Your first duty in this case, from this point on will be to select a Foreman. After you have arrived at an unanimous verdict on each charge, your verdict will be reduced to writing and signed by your Foreman. Now for each of the three charges we have, I have prepared for you an alternate form verdict which I think, no matter what your verdict is on any of these

charges, you will have (inaudible) forms ready for you. Now members of the jury it is twelve o'clock, we have been stopping for lunch right around one o'clock. If you all would like to go to lunch now before you start to deliberate, we can do that. If you want

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VIRGINIA: IN THE CIRCUIT COURT OF
THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

VERDICT

We, the jury, find the defendant guilty of Capital Murder, as charged in the indictment and as defined in Instruction No. 1.

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Capital Murder, but guilty of Murder in the First Degree, as charged in the indictment, and fix his punishment at _____.

/s/ _____
Foreman

DATE: _____

We, the jury, find the defendant not guilty of either Capital Murder or Murder in the First Degree.

/s/ _____
Foreman

DATE: _____

VERDICT

We, the jury, find the defendant guilty of Robbery, as charged in the indictment, and fix his punishment at Confinement in the penitentiary for life

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Robbery.

/s/ _____
Foreman

DATE: _____

VERDICT

We, the jury, find the defendant guilty of Abduction, as charged in the indictment, and fix his punishment at Life confined to the State Penitentiary

/s/ John Emil Illegible
Foreman

DATE: 6-21-90

We, the jury, find the defendant not guilty of Abduction.

/s/ _____
Foreman

DATE: _____

VIRGINIA: IN THE CIRCUIT COURT OF
THE COUNTY OF AUGUSTA.

[Caption Omitted In Printing]

INSTRUCTION # 1

The Defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant killed Leanne Whitlock; and
- (2) That the killing was willful, deliberate and premeditated; and
- (3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above [sic] elements of the offense as charged, then you shall find the defendant guilty of capital murder.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more or [sic] the elements of the offense, then you shall find the defendant not guilty of capital murder.

6/21/90
Illegible
7HW

VIRGINIA: IN THE CIRCUIT COURT OF
AUGUSTA COUNTY

TOMMY DAVID STRICKLER

v.

COMMONWEALTH OF VIRGINIA
ORDER ASSIGNING COUNSEL TO
PURSUE HABEAS CORPUS REMEDIES

It appearing to the Court that the defendant, Tommy David Strickler, has been tried and convicted in this Court on the following felony charges: Abduction, Robbery and Capital Murder.

And now comes the defendant, and makes known to the Court his intention of pursuing his *habeas corpus* remedies on the above charges, and requests the appointment of counsel to pursue said *habeas corpus*.

It is, therefore, ORDERED that Victor M. Santos and Katherine Carruth Link, discreet and competent attorneys at law practicing before the bar of this Court, be, and they hereby are, appointed co-counsel for the said Tommy David Strickler to pursue his *habeas corpus* remedies, with no duplication of services to be done by co-counsel.

It is further ORDERED that certified copies of this Order be mailed to all counsel.

ENTER:

/s/ Illegible
Judge

Date: December 5, 1991

VIRGINIA: IN THE CIRCUIT COURT OF AUGUSTA
COUNTY

TOMMY DAVID
STRICKLER,
Petitioner

PETITION FOR WRIT
OF HABEAS CORPUS AD
SUBJICIENDUM

v.

EDWARD W. MURRAY,
Director
Virginia Department of
Corrections
6900 Atmore Drive
Richmond, Virginia 23225,

CHARLES THOMPSON,
Warden
Mecklenburg Correctional
Center
Highway 386 - South
Boydton, Virginia 23917,

and

THE COMMONWEALTH
OF VIRGINIA,
Respondents

RECEIVED
SEP. 1, 1992

Comes now the Petitioner, Tommy David Strickler, by counsel, and files this Petition for a Writ of Habeas Corpus Ad Subjiciendum, pursuant to the authority of Section 8.01-654 of the Code of Virginia (1950) as amended. Petitioner is incarcerated and is being held by the Virginia Department Corrections under two sentences of life imprisonment and a sentence of death entered by the Circuit Court of Augusta County. Petitioner's convictions and his sentence of death violate the Constitution of

the United States, the Constitution of Virginia, and other applicable statutes. Petitioner respectfully requests an evidentiary hearing and adjudication of the issues raised herein.

* * *

GROUND OF UNLAWFUL DETENTION

I. Ineffective Assistance of Counsel

Defense counsel failed to provide effective assistance of counsel to Petitioner during the pre-trial proceedings, at the trial during which guilt was determined, during the sentencing hearing, and on appeal to the Supreme Court of Virginia and the United States Supreme Court, in violation of rights guaranteed to him by the fifth, sixth, eighth, and fourteenth amendments to the United States Constitution, and article I, sections 8, 9 and 11 of the Virginia Constitution, as follows:

1. Counsel failed to move for a change of venue or venire as the result of adverse publicity concerning the case and the defendant. Counsel failed to make any pre-trial motion with respect to a change of venue or venire based on newspaper articles, radio broadcasts and television broadcasts. Counsel further failed to move for a change of venue or venire when voir dire disclosed that almost every venireman had been exposed to news coverage of the disappearance of the victim, the recovery of the body, and the arrest of the defendant. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

2. Counsel failed to file a motion under *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny, to have the Commonwealth disclose to the defense all exculpatory

evidence known to it-or in its possession. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

3. Counsel failed to conduct competent voir dire of the members of the venire by virtue of counsel's failure to inquire about the racial attitudes of the prospective jurors. The victim was black, and the defendant was white. Counsel should have inquired into the possibility that members of the venire would be inclined to impose the death sentence as the result of the venire members' attitudes about atoning for racism of whites and past oppression of blacks. U.S. Const. amend. V, VI, VIII, XIV Va. Const., art. I, sect. 8, 9, 11.

* * *

38. Counsel failed effectively to cross-examine Anne Stolfus and failed to impeach her credibility. (See Exhibit 2) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

39. Counsel failed effectively to cross-examine Donna Tudor and failed to impeach her credibility. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

40. Counsel failed effectively to cross-examine David Oxley, the medical examiner, by failing to elicit from him testimony that it was possible (1) that all four head wounds were inflicted by one blow, (2) that, if there were three blows as he believed there were, all three were necessary to kill the victim, (3) that the victim was unconscious as the result of other traumas before any blow to the head. Each of these possibilities would have had a bearing on the jury's ultimate finding of vileness. (See

Exhibit 3) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

41. Counsel failed to cross-examine Dianna Willemann and to show the inconclusive nature of the blood, saliva, and semen comparisons for purposes of linking the defendant to the commission of the murder or any sexual assault on the victim. (See Exhibits 4 & 5) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

42. Counsel failed to cross-examine Michael Grim and to show the inconclusive nature of the fingerprint comparisons for purposes of linkage the defendant to the commission of the murder. (See Exhibit 6) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

43. Counsel failed to cross-examine Myron Scholberg and to show the inconclusive nature of the hair comparisons for purposes of placing the defendant at the scene or linking him to commission of the crimes charged. (See Exhibits 7 & 8) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

44. Counsel failed to object to admission into evidence of the certificates of forensic analyses, Exhibits 37, 38, 39, and 41, on the basis of the Commonwealth's failure to file the certificates with the clerk of the court at least seven days prior to the hearing or trial, as required by Section 19.2-187 of the Code of Virginia (1950) as amended. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

45. Counsel failed to move for a continuance until such time as Henderson could be apprehended and specimens taken for analysis. Such analysis, performed after Henderson's arrest, would have demonstrated that it was possible that Henderson, not Strickler, was the perpetrator of the murder and of any sexual assault that may have occurred. (See Exhibits 5 & 8) U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

46. Counsel failed to object to the improper expression of opinion by the medical examiner as to the body of the victim having been dragged by its feet on its face. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

* * *

21. Defendant's conviction for capital murder and sentence to death are the result of the arbitrary and capricious application of the Virginia capital murder statute to defendant. The giving of Instruction No. 1 and Instruction No. AA and the refusal of Instruction No. A and Instruction No. B resulted in a conviction of capital murder and imposition of the death sentence, whereas a second defendant charged with the same offenses who had the benefit of instructions on the so-called "trigger-man" rule was convicted of first-degree murder and sentenced to life imprisonment. The giving of different instructions to two defendants charged with the same crime and tried upon substantially the same evidence is a unconstitutionally arbitrary and capricious application of the capital murder statute. U.S. Const. amend. V, VI, VIII, XIV, Va. Const., art. I, sect. 8, 9, 11.

22. The giving of Instruction No. 1 resulted in an unconstitutional application of the Virginia capital murder statute to defendant. Instruction No. 1 contained language which allowed the jury to base a conviction of capital murder on a underlying offense not allowed by Section 18.2-31 of the Code of Virginia (1950) as amended. One of the elements of the offense set forth in this instruction was

(3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.

But Code Section 18.2-31 does not include abduction with intent to defile in the definition of capital murder except with reference to a victim under the age of 12 years. The jury was allowed to base its finding of guilt of capital murder on predicate offense not found in the statute.

The error of inclusion of the language "or with the intent to defile" is not harmless. There are no findings of the jury which allow a conclusion to be drawn that the jury found the other underlying offenses which were also possible bases for a finding of guilt.

The first alternative, a killing during the commission of robbery while the defendant was armed with a deadly weapon, has not been established. The jury found the defendant guilty of robbery "as charged in the indictment." (R. 126) The indictment did not charge defendant with robbery while armed with a deadly weapon. Instead, it charged him with robbery "by violence to the

person or by assault or by putting the said Leanne Whitlock in fear of serious bodily harm." No finding was made by the jury that defendant was guilty of robbery while armed with a deadly weapon. Thus, the verdict of guilt as to robbery does not establish the underlying offense of robbery while armed with a deadly weapon.

The second alternative, a killing during the commission of abduction with the intent to extort money or a pecuniary benefit has not been established. The jury found defendant guilty of abduction "as charged in the indictment." (R. 127) The indictment for the offense of abduction was expressed in the disjunctive - the jury could find either intent to extort money or other benefit or intent to defile and return a guilty verdict. The verdict did not state which of these was found or whether both were found. Because there is no means of determining from the record if the jury found defendant guilty of abduction with intent to extort money or other pecuniary benefit, this underlying offense has not been established as the basis of the capital murder conviction.

The inclusion of an underlying offense which is not in the capital murder statute undermines the jury's verdict. A verdict based on conduct not defined as capital murder is constitutionally impermissible. Moreover, the prejudicial effect of inclusion of the language not in the statute is so great that it requires that the verdict of guilt as to capital murder be vacated. U.S. Const. amend. V, VI, VIII, XIV; Va. Const., art. I, sect. 8, 9, 11.

* * *

B. That the court command the respondent to bring petitioner before the court at a time and place specified,

and that the court take such action on this petition as is appropriate.

C. That the court grant petitioner an evidentiary and plenary hearing on this petition and accord to him the right to present testimony and documentary evidence, as well as argument of counsel.

D. That the court set aside petitioner's convictions and sentences because of the violation of his rights under the fifth, sixth, eighth and fourteenth amendments of the United States Constitution and the corresponding provisions of the Virginia Constitution.

E. That the court grant to petitioner such other relief as his case may require.

/s/ Tommy D. Strickler
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